UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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LEHMAN BROTHERS SPECIAL
FINANCING, INC.,

Plaintiff,

v. 14 CV 10070(KPF)

BANK OF AMERICA NATIONAL
ASSOCIATION, et al.,

Defendants.

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New York, N.Y.
May 4, 2015
10:00 a.m.

Before:

HON. KATHERINE POLK FAILLA,

District Judge

APPEARANCES

WOLLMUTH MAHER & DEUTSCH, LLP
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TIMOTHY P. HARKNESS

(Case called; in open court)

(In open court; case called)

THE COURT: I will begin with some general thoughts. Thank you all for coming today and thank you also for the briefing in this case, which is exceptionally high quality. I am grateful for that because, and this is a bit of a frolicking detour, sometimes you think being in the Southern District of New York that all of the briefing you will receive will be extraordinary and excellent and amazing and it is not. So it fantastic when it is so I am grateful to you.

I have questions for each side as it were and you will have to let me know who is the best person to whom to direct the question. I ask you to keep a things in mind with respect to these. Number one, please don't read too deeply into these questions. One of my jobs and one of the things I enjoy most is kicking the tires of a parties' arguments. So the fact that I may ask something that suggests I have a particular view, doesn't mean I have that view. Please don't think that.

Secondly, there are questions that I think are more appropriately directed to one side or another; but when it is your turn, if there is something you would like to add or clarify, you are certainly welcome to do that. I simply didn't want to keep everyone here longer than I am going to keep you here already.

Thirdly, I am sure you are wondering, well, when will she decide, and I will as quickly as I can. So what I have asked if I could have the transcript of these proceedings by the end the day tomorrow, I will see if I can get something to you at the end of the week. I don't know how we're going to do that other than having sort of representative folks on a telephone line when I read you my thoughts. Because I think it is more important that you get an answer quickly. So we will see how that works out. We'll deal with it. It may be that you're so effective that I am hopelessly confused.

Let's begin. Let me speak first to the movants. Who is taking the laboring war for the movant?

MR. BLOCKER: Your Honor, Mr. Livshiz and I are going to be answering any questions you have. We have divided our thoughts in terms of I am going to handle the permissive argument and Mr. Livshiz will handle questions relating to the mandatory withdrawal. If they are in between, we'll figure out how to answer them.

THE COURT: Well, I have a couple in between ones to begin. I will start with Mr. Livshiz. Mr. Livshiz, please stand so that there is not a monitor in front of you and also if you could speak as closely to the microphone as you can. I am not going to ask you to contort yourself but have that up there. If we have any issues, we'll talk to you.

Good morning, sir.

MR. LIVSHIZ: Good morning.

THE COURT: Let's begin with the easy question. What is the status of the proceedings before Judge Chapman at this time?

MR. LIVSHIZ: Your Honor, the status of the proceeding before Judge Chapman at this time is that the class cert motion is being briefed. On Friday the defendants submitted a request to file a sur-reply to address new issues raised in plaintiffs' reply brief on class certification.

THE COURT: So that certification motion is not decided?

MR. LIVSHIZ: It has not yet been decided, your Honor.

THE COURT: And it is your hope, sir, I sort of swoop in and take it away?

MR. LIVSHIZ: Well, the questions necessarily posed by the plaintiffs' motion for class certification raise novel questions of federal law, non-bankruptcy federal law, that will require termination from an Article III judge both with regard to the certification of a non-opt out defendant class for damages under Rule 23(b)(2) as well as albeit the time to toll the statute of limitations, which is the question of first impression in this Second Circuit and is a question on which federal courts are unsettled nationwide.

THE COURT: I am going to unpack that a little bit later on. I guess I have a couple of antecedent questions before we start getting into the mandatory permissive withdrawal. You'll understand that I really only know what I know from the briefing that has been submitted to me. So there are questions for which I just need some clarification. There has been a suggestion, and I am not going to opine on it one way another, that this particular motion is an attempt at forum shopping. So could you please help me understand the sequence of events better. What I understand is that the complaint in the adversary proceeding was filed in September of 2010 and I would like to understand what happened for the next three and a half years or so. I think there was a stay. I think there was either encouragement or compulsion to participate in alternative dispute resolution proceedings. I just would like to understand what has been going on for the past three and a half years.

MR. LIVSHIZ: Of course, your Honor. The short and sweet answer is nothing happened for three and a half years while the case was stayed. There was compulsion to participate in alternative dispute resolution and that process has run its course.

THE COURT: In its entirety?

MR. LIVSHIZ: I believe there are parties still involved in mediation but the litigation has been reactivated and restarted and is now moving forward including LBSF IS seeking to confirm a defendant class, which is the first order of business.

THE COURT: At the time of each of the amended complaints in this case was there an opportunity to object to that complaint because of some -- based on some of the issues that are sketched out in your motions? For example was there, could there have been the analogue to a motion to dismiss based on -- I don't know even know what it would be -- based on the belief that B and Y was wrongly decided or something along those lines. Basically I want to know -- you told me now that nothing was done. Tell me please whether something could have been done.

MR. LIVSHIZ: My understanding is no, your Honor.

THE COURT: I get the sense, although I could be wrong, that the original complaint in this case, the September 2010 complaint, had its genesis in Judge Peck's decisions in B and R and Valley Rock. Other than the appeal that was settled, the one that Judge McMahon certified, were there any other opportunities to challenge that decision or Valley Rock or the Michigan State Housing Development Authority decisions?

MR. DeFILIPPO: Your Honor, the defendants in this case were not the defendants in either Perpetual or Valley Rock or the Michigan Housing case. So we have not had an opportunity to challenge the underlying reasoning of Judge

Peck's decisions in those questions.

THE COURT: I appreciate the clarification. Has anybody had the opportunity to challenge them. For example, the B and Y decision it went up and it was settled and I understand that. I don't know what happened ultimately with Valley Rock and I don't know what happened with Michigan State.

MR. BLOCKER: So the sequence is perpetual did settle, your Honor. Valley Rock also settled. There was never an opportunity to the appeal. I think there was an attempt to appeal, but it was turned down.

THE COURT: There was an attempt to appeal?

MR. BLOCKER: To seek an interlocutory appeal that was turned down. Michigan State Housing, the Michigan State Housing prevailed. So there would have been opportunity for Lehman to appeal.

THE COURT: And they did not?

MR. BLOCKER: Not that I know of.

THE COURT: I guess we wouldn't be having these discussions. There are none of these other types of case that might have lent themselves to appeal opportunity for Judge Peck's decision or Judge Peck's thinking in B and Y?

MR. BLOCKER: I don't have a full view of the landscape. That is probably better directed to Lehman.

THE COURT: I will certainly ask them.

MR. BLOCKER: There is enough here who are representing parties who are in this proceeding.

THE COURT: Thank you. I will go back to Mr. Livshiz.

Sir, the bankruptcy court scheduling order was filed in 2014, correct, July 2014?

MR. LIVSHIZ: Correct, your Honor.

THE COURT: Was there any ability to challenge the scheduling order, any opportunity, or is that something that is not suspectable to appeal or challenge to a reviewing court of any type?

MR. LIVSHIZ: Well, as your Honor knows we objected to scheduling proposed. We litigated. We lost. We moved forward with the case, participated in class certification discovery and waited for LB to file its motion for class certification. When they filed their motion, that triggered -- that put at issue certain questions that require an adjudication of and will require necessarily consideration of non-bankruptcy federal law, which is the point which we filed our motion seeking withdrawal. Mindful of the need not to bother the support of seriatim motions. We included in our motion additional grounds for withdrawal, including whether Lehman's common law claims can be applied extraterritorially as well the permissive withdraw questions as to which Mr. Blocker referred to.

THE COURT: In her decision, at least in the transcript, Judge Chapman indicated that she was leaving open the possibility of individualized consideration of certain defenses.

First of all, do you know what I am talking about?

MR. LIVSHIZ: I do.

THE COURT: Second of all, what does that mean?

MR. LIVSHIZ: What we understood it to mean is to the extent one of the defendants had an argument that applied to it and had individualized fact, Judge Chapman permitted those defendants to raise that question. Some three defendants I believe have chosen to do so and are litigating the personal jurisdiction defenses before Judge Chapman.

THE COURT: No one is using that particular entree that she has left open to argue the issues that you brought before me, Bank of New York and some of those nature, the safe harbor?

MR. LIVSHIZ: No, your Honor.

THE COURT: I would like to ask you a couple questions about Bank of New York and Valley Rock. I suppose Michigan State as well. If you prefer Mr. Blocker answer them, you will let me know.

Tell me first what you think the safe harbor provision of Section 560 applies to, Mr. Blocker.

MR. BLOCKER: So heres the dispute, your Honor: The question is in the documents that create this swap, there is a provision that creates a priority depending on certain conditions. Our position is that everything related to liquidation or termination of the swap, which would include everything related to priority provision is protected by the safe harbor. So basically everything that is at issue in this case is protected by the safe harbor. That is one of the reasons we're interested in seeking to have the reference with and have that issue decided. As your Honor pointed out, B and Y was decided 2010. It has been sitting there five years unreviewed by any court. We think it would end this case or almost entirely end this case if it went our way.

THE COURT: So then how did Judge Peck get it wrong?

MR. BLOCKER: Here is what Judge Peck ruled and then we'll tell you why we think it is wrong.

THE COURT: I promise you I did read his decision.

MR. BLOCKER: Judge Peck held two things. He said in B and Y there was something called Condition 44, which I didn't look at the underlying cases, but I suspect it is analogous to what we have here. Judge Peck tells those weren't part of the swap agreement itself and therefore weren't covered by the safe harbor under 560. So that is one basis for his ruling. The other basis for his ruling was he said essentially even if it was part of the swap that it didn't relate to a determination, liquidation or acceleration. He said it was somehow unconnected to that. We think that decision is wrong and we think it is wrong because if we look at the definition of "swap" in the Bankruptcy Code, which I will get to the provision 10153(b) sub A, if you look at that particular provision it says that a swap agreement is supposed to be broadly interpreted to include all of the documents. So Judge Peck never explained why in the three sentences he gave on the safe harbor the swap prior to the Condition 44 wasn't part of the swap agreement, but we think that is plainly wrong.

Second, as a simple matter, it has to be part of the method of liquidating or accelerating the swap because that is how you determine first who is going to get any of the money.

So we think the decision is wrong. If it were to come out the way we think it does, I think this case is over.

THE COURT: You repeatedly indicated these decisions are unprecedented. Had no one else ever found analogous provisions of swap agreements to be perhaps subject to ipso facto rules, or is it that his interpretation of the safe harbor is where you parted company with Judge Peck?

MR. BLOCKER: No, we have other disputes with Judge Peck. Judge Peck's opinion -- look, we're not criticizing Judge Peck. We just disagree with his opinion. We also disagree with the notion that the later filing by LBSF in its bankruptcy, which was two weeks later, constituted a unitary filing event.

Putting that to one side, your Honor, to answer your question I am not aware that the safe harbor has ever been litigate in the context of a swap agreement. Lehman can correct me if I am wrong. This was a seminal decision or the first decision -- maybe seminal is the wrong word -- on the topic that hasn't been reviewed in the last five years.

THE COURT: The decisions themselves, B and Y and Valley Rock are different. They are necessarily because of the procedural context in which each arises. They are also different when contrasted with Michigan State Housing Development Authority. What are the factual differences if you know between these cases that explain the different result in that case? I'm trying to harmonize the three of them and I had a little bit of difficulty but I am not a bankruptcy judge. It may be something beyond me.

MR. BLOCKER: I don't think I will be able to harmonize them because we don't think they are harmonizeable. We don't think that is the case. Let me talk about the first two. I think B and Y and Valley Rock are fairly similar. You have similar provisions, similar disputes. The reason Michigan State Housing was different and why it came out a different way is what was at issue there was at method by which liquidation would take place. So the question there was did you use market quotation or some other method to liquidate the -- to make the payout. Judge Peck found that in that decision that that particular clause was covered by the safe harbor because it was part of the liquidation. We would say, your Honor, and I think it is true and the reason you're having a hard time harmonizing these is because the two cases that he decided at the beginning, Michigan State Housing, they don't make a lot of sense in our view when you put them together. It seemed like the priority provisions are all part of the swap, the method of paying out the priority provisions is part of the swap. Dividing up between the two doesn't make a whole lot of sense. I cannot help you really harmonize them. I think they are just flatout inconsistent.

THE COURT: To the degree to which Judge Chapman has indicated Judge Peck's prior decisions are law of the case but then also with the proviso that of course he is going to have decide each case on the facts, why are you so worried that she is going to stringently adhere to B and Y if you think it is wrong? There is the subsequent decision. She will have to contend with that as well, is she not?

MR. BLOCKER: Well, Judge Peck's opinion in Michigan State Housing suggests that the cases are harmonizeable and has a section at the end explaining why he thinks the B and N and Valley Rock decisions are not inconsistent with his decision Michigan State Housing.

I actually disagree with your Honor. I don't think -- what Judge Chapman is going have to decide is essentially do I agree with Judge Peck or not on the issue of whether for example the safe harbor protected activity that took place here. She has already said not once but in our view twice that she views that as law of the case. If it is law of the case we're spinning our wheels down at the bankruptcy court because we'll get the same outcome as we got from Judge Peck.

THE COURT: Your other point, which I think is apparent from your brief is you would prefer not to do that after going through what I will say is the drama of a class certification process?

MR. BLOCKER: That's right. Your Honor, you have to sort of put yourself in our shoes. We have been in this case since 2010. For the last five years we have had no ability to file a motion to dismiss to try to get out or even to try to argue B and Y was wrongly decide. We have been trapped in this case. So what we would like to go through a bankruptcy -- go through the bankruptcy proceeding, which is likely to have the same outcome as B and Y and Valley Rock given Judge Chapman's comments about the law of the case? From an efficiency standpoint to us that doesn't make a lot of sense. We have never understood why Lehman thinks it makes more sense to go through that process rather than to have that issue litigated.

THE COURT: I will talk about that in a little bit. I have some views of it. For me it is a little bit easier to focus on the decisions with which you take issue and then I will get to that point. Are the provisions that are at issue in this case to the extent that commonalities can be discerned among them, are they more likely ones in Michigan State Housing or are they more like the ones in B and Y or can it not simply fall into one of the categories?

MR. BLOCKER: As a litigation matter, it is more like B and Y and Valley Rock in the following sense: The dispute in Michigan State Housing concerned the method by which you value the amount paid out at the end. So it is a dispute about whether use of market quotation or another method to value the amounts that were going to be distributed. What happened in B and Y and Valley Rock is really the antecedent question of Carlos priority provisions, ipso facto clauses and so forth protected by the safe harbor. It is really at least at the motion to dismiss stage our dispute is much more like B and Y and Valley Rock than it is like Michigan State Housing.

THE COURT: A few moments ago you said to me that among the things with which you disagree with Judge Peck were his decision to sort of aggregate the bankruptcy filing dates. I saw that language and I also saw that he seemed to make this a -- I think sui generis appeared in the decision or there was some discussion how unique this was. I do understand your disagreement with that. I understand your disagreement was with what we have been talking about. I thought as well in your briefs there was some discussion about your belief that Judge Peck may have disregarded U.K. law in the process. I didn't really see that. I guess what I saw from the decision was that he took pains to note what the U.K. courts had decided, what he had decided, and he limited himself to deciding only the declaratory portions of the B and Y issue with a view as I understood it to try to work together with the U.K. courts.

Am I misinterpreting that from his decision?

MR. BLOCKER: No, I think that is fair. When we talked about inconsistencies with English courts, I mean the swaps at issue in B and Y and I think were governed by English law so there was always going to be a question of to pay attention to American bankruptcy law or to pay attention to English law. Judge Peck thought it was important to pay attention to American bankruptcy law and that was after the high court in England had already ruled that swaps of the priority provisions were enforced.

THE COURT: My recollection is that at least one of the litigants in B and Y or Valley Rock conceded that what I am calling the flip clauses or ipso facto agreements under the Bankruptcy Code and focused their energies instead whether the safe harbor applied. What I understood from the parties here is that concession is not being made; is that correct?

MR. BLOCKER: We're not conceding that, your Honor, the safe harbor question is really -- even if you were to assume it was a ipso facto clause, the safe harbor provision is where some of the action is at. The reason we're not conceding is on the first point has to do with unitary filing point. Judge Peck said LBHI had filed two weeks earlier made a difference when a lot of these swaps were terminated long before -- not long before -- two weeks LBSF filed for bankruptcy.

THE COURT: I don't know whether Mr. Livshiz wants to add to that. No, he is fine. He looks like he had an undelivered argument. I wanted to make sure he had that opportunity.

Are there other distinctions among the swap agreements in this case that make those decisions -- B and Y, Valley Rock, and perhaps Michigan State -- less law of the casee there to go with your harmonizeable that we're making up for purposes of this argument.

MR. BLOCKER: You and I can adopt that for today. The answer is I don't know. Here is the reason I don't know: I have not recently dug into the briefs of B and Y to figure out what the underlying documents look like. But when Judge Peck -- at the very end of his opinion when Judge Peck talked about the safe harbor, he says that the documents -- that the Condition 44 was not part of the swap agreement. But his whole opinion on this is three sentences. He never explains why that is. I don't know to what extent our provisions are the same or similar. I just don't know without looking at the underlying documents. The other thing I would say, your Honor, there are also -- and we pointed this in our class certification -- there are differences among the documents even with respect to the defendants. So there is not going be necessarily one answer fits all.

THE COURT: Going back a moment to Judge Chapman's statements about her views on Judge Peck decision. As I understood it these were being decided in the context of this same bankruptcy? These are different adversary proceedings?

MR. BLOCKER: Correct.

THE COURT: So would it not have been odd for her to say she was going to reexamine or reconsider what Judge Peck had done?

MR. BLOCKER: To some extent I guess that may be true. I think that bolsters our argument for seeking withdraw to the reference. There are cases certainly, your Honor, that talk about law in the case, certainly within the adversary then cross-adversaries within the same bankruptcy. I don't have those cases ready at command. I agree with you that it is not all that surprising that she would say in the context of this particular case, I am not going to reexamine an issue that was decided earlier. I don't think it is a practical matter that she is not going to try to second guess one of her colleagues that she served with for many years. We understand that going in. What is the implication of that? That is what your Honor has to decide. Given what is at stake here, and this a case with billions of dollars at stake. There are dozens of lawyers in the courtroom representing 70 or so different defendants. The question is since we have those decisions already, since we already have the guidance from the bankruptcy court on these issues, what purpose is served by continuing to litigate these issue in the bankruptcy court as opposed to having them reviewed for the first time in five years?

THE COURT: I guess the response to that would be that again it has been argued to me that these agreements are themselves different. So I guess it is not as clear to me that while adopting perhaps the legal reasoning of the B and Y and Valley Rock decisions that she is necessarily going to come out the same way. I suppose one could argue to her that Michigan State Housing Development requires her to do something different or maybe represents an revolution or something else. So I guess I am trying to figure out how forgone a conclusion this is. Let's be clear. I appreciated what you are talking about in terms of the time that you waited, I understand, and the time that you believe you'll have to wait as a consequence the certification motion. That I get entirely. I am really on a more limited point now, which is how sure are you that she has made up her mind on the issue of the safe harbor provision?

MR. BLOCKER: Judge, I obviously cannot get inside of Judge Chapman's mind. I don't know the answer to that. I can only tell you what I have read. I hope your Honor will appreciate I am little bit on a razor's edge here because I don't want to make a concession because if we don't win the motion, we have to go back to the bankruptcy court and we don't want Lehman saying, Well, fait accompli.

THE COURT: Fair enough.

MR. BLOCKER: Let's put it this way: Those decisions are a huge thumb on the scale. I don't understand -- and especially if you look at the safe harbor provisions. I don't see if you do take -- if she is not going to revisit, Judge Chapman is not going to revisit the safe harbor rule. Assuming that the documents are similar, and I don't know because I haven't done any comparison, at a minimum that is I huge thumb on the scale. It means that what we are likely to have is we'll file motions to dismiss but if she follows those, there is a good chance they will be denied. If they are denied, we'll be in the bankruptcy court for a couple years. So we'll be back here 2017, '18. We'll have to go through eight years before we can get Judge Peck's decision reviewed. So I don't know the answer to the question about how sure I am she will rule against us. We'll take a run at trying to convince her it is wrong, but like I said it is at a minimum a huge thumb on the scale.

THE COURT: I am going to change your metaphor. Let's say it is an impediment, a tough row to hoe.

MR. BLOCKER: Any of those analogies.

THE COURT: Before I go back to Mr. Livshiz, let me ask you this: I would like to understand with what degree of granularity I am to examine the legal issues here. I have read your arguments. I have read obviously everything here. I have 23 single spaced pages of notes if it makes you feel any better. I have been preparing for this. I would like to understand do I need to make a preliminary determination about the viability of the certification motion, or is it just enough to note that there are significant non-bankruptcy issues implicated if indeed there are?

MR. BLOCKER: Mr. Livshiz can correct me if I am wrong. This is under his territory. I don't think you need to decide the legal issues. What you need to do on the mandatory side is make an assessment that they meet the test substantial enough to warrant mandatory withdrawal. On the permissive side you don't need to weigh in on any of the legal issues. It is an efficient column.

THE COURT: One last question. You've asked me to appreciate things from the defendants' perspective. I am sure Lehman and their counsel will do the same. I will ask you to appreciate the lot of any judge, district or bankruptcy. The concern that I have is that Judge Chapman obviously knows bankruptcy law better than I do. It may be that she may make mistakes in the adversary proceeding either during the certification process or during the resolution of the merits.

I am not going to concede that, but I can open up myself to the theoretical possibility it could happen. The point the standing order of reference that I understood exists in district is to let her and my concern is the converse is for me to basically take over the bankruptcy case and get involved at a level of micromanaging I don't think I want to do. Why can't I let her do this?

MR. BLOCKER: Well, let me -- this is the way I would think about it, your Honor, and ask you to think about it. I have used Judge Peck's name and Judge Chapman's name. Really it is the bankruptcy court. It doesn't matter if it is a new judge or an old judge. The bottom line in the usual instance where someone is asking a district court do withdraw the reference, there is no guidance. If there is no guidance of course it is going be the case that the bankruptcy judge could make mistakes. I am not saying they would. The bankruptcy judge might make mistakes. We do let that happen and then they come up to the District Court if one of the parties wants to appeal. The Court has already weighed in on issues, on the key bankruptcy issues that matter. Now what we need is a District Court to decide not only the issues on mandatory withdrawal, that affect of both the main adversary proceeding and the questions on class certification, but what we really need is more guidance on the standard. Think about it, your Honor, why have years of proceedings down in the bankruptcy court with a standard that may or may not be correct? Even in Judge Peck's opinion he acknowledges that his rulings are controversial, that he understands they are going to create a lot of controversy. It makes more sense to get that sorted out now. This isn't the run of the mill request for withdrawal.

THE COURT: Let me stop you for a moment, sir. I do recall Judge Peck saying that at the end of the decision, but for better or worse we're here five years later and there isn't a well established body of case law. It may be because these particular events were sufficiently singular but no one has managed to weigh in this on them. I had this fantasy that I was going to look up the Bank of New York decision and find all sorts of cases commenting and there is not. There are not.

MR. BLOCKER: The sum total of the work is Judge Peck's later opinions is what it comes down to.

THE COURT: Right. For everyone in this courtroom certainly there would be a desire for resolution and I understand that. In terms of this wreaking havoc on the Bankruptcy Code or bending the Republic or something along those lines, it hasn't happened yet because no one else seems to be dealing with it. I just don't know what to do with that knowledge.

MR. BLOCKER: I think your Honor has to conclude, though, that it is going to wreak havoc on the Republic. I don't think you need to make that conclusion or to grant our motion at least on the permissive side. At the end of the day what you have is this is a dispute where millions of dollars are going to be spent on discovery and other things that we think can be taken care of right at the front end if somebody looks at the safe harbor with a fresh eye. I am fully sympathetic to Judge Chapman's play. She has got two, three opinions now from one of her colleagues and I can understand her desire not to and want to overrule one of her colleagues.

THE COURT: I am laughing, sir, because you are presupposing that any reticence she has is because she doesn't want to hurt the feelings of Judge Peck. Maybe she agrees with his rationale. Let's not put ourselves in her mind.

The issue is could she if she wanted to certify this issue to somebody, either district judge or the Second Circuit? Is there some way for her resolve the merits issue that you think is so dispositive and thereby save for herself the drama of class certification?

MR. BLOCKER: I don't know the answer to that. If there is some mechanism she can say, Judge Failla, please decide?

THE COURT: It doesn't have to be me really.

MR. BLOCKER: Well, we have you here. Is there such a mechanism? I don't really know. I would canvass my colleagues.

THE COURT: I am seeing no's all over. A girl can hope.

Let me talk to Mr. Livshiz for a while.

MR. LIVSHIZ: Your Honor, if I could augment or supplement Mr. Blocker's point.

THE COURT: Absolutely.

MR. LIVSHIZ: Short of the Republic following, there are more specific issues here that would justify looking at this with new eyes in the near term. This is not the first time this issue has played out in this district and a few years ago in 2001, Enron filed for bankruptcy and brought a case against a significant number of defendants. Those defendants much like the defendants here moved to dismiss on the basis of a safe harbor. Judge Gonzalez in that case denied the initial motion to dismiss. The defendants were forced to for years litigate the question through discovery in the bankruptcy court. Many settled for significant amounts of money. Ultimately when the question did get to the District Court, the decision under the safe harbor was reversed. That case then made it to the Second Circuit which confirmed McMahon's reversal of Judge Gonzalez. That in some sense demonstrates what is some level of stakes and provides a demonstration of the point that Mr. Blocker was making. Looking at these questions now can save a significant amount of time and money for all involved and then would be a reason we would submit to withdraw the reference for cause.

THE COURT: Thank you for the thoughts. Let me ask you some questions about mandatory withdrawal. Absent the class certification proposal, would you be seeking withdrawal of the reference? If you had asked Judge Chapman to invert the order of the scheduling order and had you succeeded, would we be here now?

MR. LIVSHIZ: Your Honor, we would be -- well, depending on what exactly of these we have tried to do, we would potentially be on the extraterritoriality offense that certain defendants have. That defense -- their assertion of common law claims seeking targeting conduct abroad necessarily asks you to invoke your authority under the Rules of Decision Act and that is the question of first impression countrywide of systemic accordance for the federal courts who adjudicate common law claims all the time. That would have been a basis for withdrawal, your Honor, that we would have made. As matters played out, we have obviously objected to the scheduling order. We lost. We moved on. I will have to certify defendant class and the way we seek to do it and the reasons for which we seek to do it necessarily pose questions of federal law that bring us here today.

THE COURT: I am going to hold the Rules of Decision Act to the side for the moment because that does interest me but we talked about class certification so we'll focus on that. I understand your disappointment that class certification precedes consideration on the merits, but just thinking about the classes that I have certified or not certified as fate would have it, it is typically the case, is it not, that you deal with the certification issue first before dealing with the merits?

MR. LIVSHIZ: Well, your Honor, normally defendants get to make a motion to dismiss before certification is decided. That is the typical process in which these things run. The unique feature here is not only it it a class action but it is a defendant class action. That poses certain questions that require an answer.

THE COURT: I guess what was the alternative for her? You can imagine, I could imagine that she would not want to receive dozens or scores of motions raising the issues. What you've said to me in your briefing is that District Courts, and I suspect bankruptcy courts too, are you capable of handling complex cases. What are you contemplating? Are you contemplating someone taking the lead and everybody else either trying to distinguish themselves from that case or sign on to it or somehow preclusive or were you thinking of dozens of motions to dismiss or dozens of motions to reconsider B and Y?

MR. LIVSHIZ: God, no, your Honor.

THE COURT: You understand you only have to write one of them. Understand we are on the receiving dozens.

MR. LIVSHIZ: I sympathize, your Honor. They are numerous ways in which federal courts can manage their docket. Nothing requires Judge Chapman to consider dozens of motions. In fact as defendants have demonstrated in objecting to the scheduling order in the briefing before this case and indeed opposing class certification, defendants are capable working together to submit one -- to make a limited number of submissions.

THE COURT: There was a group of 77, which I don't think is the sum total still in the case?

MR. LIVSHIZ: That's correct, your Honor. However, a class certification is a case in point where the defendants' opposition to L and B's motion to class certification was filed not only by the group of 77 but also by the defendants outside of that group.

THE COURT: How many?

MR. LIVSHIZ: Nevertheless we had one common opposition brief.

THE COURT: One opposition?

MR. BLOCKER: One opposition brief in addition to defendants asked to invoke Judge Chapman's step out of line provision to seeking to make a statute of limitations defense, which they believe unique to them because of certain factual matters. When she considered that question, she asked those defendants to file a supplemental submission of opposing class certification explaining how this statute of limitation question bears on the certification question. There, too, your Honor defendants submitted a single submission on behalf several defendants invoking that defense.

THE COURT: From the transcripts that I have read -- please, understand they have not been provided to me in their totality. I have snippets -- I do think Judge Chapman is understandably concerned about management of the case given the sheer number of defendants. So while I appreciate what you've just now told me, which is that when necessary and when appropriate the defense team can act as one and file a unitary brief or a primary brief with a couple of subsidiary ones.

Did you make those arguments to her? What kind assurance could you give her that it wouldn't become unwieldily to have all of you in the case in a nonclass action format?

MR. LIVSHIZ: During the schedule -- the hearing on the scheduling order defendants did represent that they would work together to file the minimum amount of paper possible and if anything the pattern of conduct of defendants indicates that they are true to their word.

THE COURT: If she had said, This certification thing is mighty difficult and I am concerned about it but I am not concerned at least I believe I have the ability and the understanding of how to deal with these bankruptcy issues instead I will order that a single brief be filed from the defense, could that have been done?

MR. LIVSHIZ: Your Honor, I don't know if a single brief could have been done.

THE COURT: A small number of briefs.

MR. LIVSHIZ: I think that could have been done, your Honor, yes.

THE COURT: That would have obviated the need for this motion?

MR. LIVSHIZ: Well, your Honor, from our perspective we believe that that is the way the case should proceed, specifically that defendant should move to dismiss and filing a small number of briefs and then to the extent anything remains of this case we could confront the rather difficult authority question of class certification. It was Lehman's insistence of the alternative offered. It was Lehman's insistence on seeking certification of the defendant not opt-out class to consider questions of liability, which is certainly, your Honor, a question of unsettled question. Indeed, a question in misimpression in this circuit and that triggered us coming here today.

THE COURT: I am sorry. My question wasn't precise. I will try to make it a more precise one. There are several reasons that you folks have made the motion to withdraw and I understood one of them to be a concern that you're going to have to go through this lengthy certification process and with all its attendant issues and then deal with the merits of the case. But if that particular concern of yours was removed, because for example the judge had agreed with you that a limited number of briefs were enough, would you nonetheless be arguing for withdrawal of the reference based on for example your concern that Judge Chapman's statement about her views as to Judge Peck's decision merited withdrawal of the case?

MR. LIVSHIZ: Well, that is when we would be making the permissive motion to withdraw. The motion is for mandatory withdrawal.

THE COURT: It seems to me that you're presupposing that she is going to grant the certification motion. Are you?

MR. LIVSHIZ: No, your Honor. We're not presupposing. Our view is that that motion must be decided in the first instance by an Article III court because that motion necessarily raises constitutional and other questions of federal non-bankruptcy law.

THE COURT: Let me explain a concern that I have with your arguments. There is a disconnect in saying to me that there is a basis for mandatory withdrawal of the reference based on the prevalence of federal non-bankruptcy law. I understand that argument. Then you sort of comfort me or try to comfort me by saying I can obviate all those very difficult issues under rule of decision act if I would decide the merits issues first. So I don't know how to describe it other than to say there is a disconnect. So because the merits issues are the thing that I am at least you would argue less well suited to do given that I am not the bankruptcy judge here. It is very weird to say you should withdraw on this basis but then not decide these issues. Please help me decide that.

MR. LIVSHIZ: Well, I understand there are two separate bases and while there may be the same motion, they are a little bit different. On the mandatory side of things we ask your Honor to withdraw to consider these questions. I note parenthetically that for a significant number of defendants among them looking at $1.5 billion in damages Lehman seeks, it is a determination of the questions and the mandatory withdrawal will lead to complete dismissal and would significantly change the dynamic of the case. Separately we requested that your Honor -- again, in a way as to obviate the need to make seriatim motions, we asked your Honor to exercise your discretion to withdraw the threshold of bankruptcy and safe harbor issues. It is not that we're asking you to withdraw and not decide those issues. The point of the permissive motion is to have you decide the issues.

THE COURT: I want to make sure I understand what you said. I understand the mandatory withdrawal argument. You are asking me to withdraw those arguments specific to B and Y and not certification arguments? Can you maybe give your answer one more time because I want to make sure I understand it.

MR. LIVSHIZ: Sure, your Honor. This is spelled out a little more clearly in our brief on page 4. We're asking your Honor to withdraw the case and we're asking your Honor to withdraw the case to -- what you do once you withdraw the case is in some sense what you would like. If you would like to consider class certification first, we would ask your Honor -- we believe that requires withdrawal and we would ask your Honor to decide the certification motion and adjudicate those questions of constitutional law. To the extent that your Honor withdraws the motion and is inclined to in the first instance consider the validity or the correctness of Judge Peck's decision in B and Y or Perpetual, we would ask your Honor to decide those questions and then to the extent that certification is needed decide those questions as well.

THE COURT: I appreciate the clarification. I will change topics. One of the things that Lehman argues is that the comparative lack of individualized responses mean something. They suggest it means several things. Perhaps a recognition of the predominance of the flip clause issue. Perhaps the absence of an individualized incentive for each defendant to pursue separate litigation. Although I wonder if that second one may be belied by the group here. Is it true that there have been few individualized responses and if that is true to what do you attribute that.

MR. LIVSHIZ: Judge Chapman's scheduling order?

THE COURT: Yes, sir.

MR. LIVSHIZ: The unique defenses that defendants have raised is jurisdictional defenses and those are moving --

THE COURT: Please slow down.

MR. LIVSHIZ: Those are moving forward. There is a number of individualized defenses that various defendants have whether it is extraterritoriality or statute of limitations or questions specific to the transaction themselves. Those issues haven't been raised because we're not permitted to raise them at this point. Class certification is what proceeds first.

THE COURT: One of the arguments you make, sir, is that a basis for mandatory withdrawal is the interaction or implication of the Rules Enabling Act and the due process clause. Let's put to the side for the moment Lehman's argument regarding commerce clause. Can't the argument always be made that any time a court is interpreting a rule such as Rule 23, it is always doing that against the backdrop of the due process clause or the Rules Enabling Act? What I mean is if the Rules Enabling Act doesn't enhance rights and the due process law requires process, it seems to me that there are always present. So it seems a little odd to me suggesting this case in particular brings those issues into a sharper relief than you would have any in other case.

(Continued on next page)

THE COURT: You can respond to that, please.

MR. LIVSHIZ: Sure, your Honor. I think Judge Rakoff's decision in principle is instructive at some point. There are certain due process issues that come up in which the bound of federal law are set. Specific jurisdiction would be an example and indeed defendants in this case have proceeded with their personal jurisdiction defenses before Judge Chapman.

One of the cases that was cited by the plaintiffs raises the question of whether withdrawal is permitted to consider a jury demand. That's another area where federal law is well plotted. What I would submit, your Honor, is what is present in this case is a unique defense, which is raised by LBSF's attempt to invoke American Pipe Tolling in the context of a defendants class action. That is a question, your Honor, which despite the fact that the Federal Rules appear in every case, as your Honor knows, is one which has not yet been considered in the Second Circuit. It is also one on which the federal courts nationwide are sharply split.

THE COURT: So what you're arguing is that because of that, because of the particular framework, this is a question of interpretation rather than application?

MR. LIVSHIZ: Correct, your Honor. We're saying that this is a question that requires this Court to interpret the Rules Enabling Act in this context and it's a question that requires substantial consideration of that question.

THE COURT: Okay. Could you comment on Lehman's argument that cases like Stern or Chateaugay made clear the due process issues are not a basis for mandatory withdrawal.

MR. LIVSHIZ: Yes, your Honor. I'd be happy to. In fact, those two cases are interesting in what they require. They concern the consideration of bankruptcy court processes and what a bankruptcy court is permitted or not permitted to do. We are asking your Honor to consider cases which concern the question of whether what federal courts writ large are permitted or not permitted to do.

So, for example, take Chateaugay, your Honor. That case concerns whether or not in setting a bar date order -- a bar date is an order that requires creditors to file claims in bankruptcy court, your Honor, provided adequate notice. This is a question that bankruptcy courts confront all the time and it is a question that the Chateaugay Court ruled is well within the ambit of bankruptcy court consideration.

Similarly, in Extended Stay, the Stern issue, your Honor, concerns whether a bankruptcy court has authority to issue, finally adjudicate certain claims. We are asking your Honor to consider the question of whether a federal court, whether it's considering a bankruptcy issue, an intellectual property issue, a securities issues, can render certain determinations. American Pipe Tolling I would submit is a good example of that in that this is a question of systemic importance to claims adjudicated by federal courts. It is a question that will arise, your Honor, whether the defendant class is in a bankruptcy proceeding or a defendant class is brought in an intellectual property context where, for example, what are, to use a colloquial term an intellectual property troll files a defendant class action against a bevy of infringers not necessarily naming them. So in that regard, I submit, your Honor, the question is starkly different.

THE COURT: I mean, as to some of the questions I have that follow, they come from the same place, and that is it seems to me that, and this again ties into the granularity question I asked of your colleague, it seems to me that one way of looking at this in terms of mandatory withdrawal is a question of how much of this is asking Judge Chapman to apply existing law and how much is asking her to interpret the law and the more it gets to interpretation then it seems the more substantial it is and then arguably, at least you would argue to me, the more there is a need for mandatory withdrawal.

I guess the concern I have is you could always argue that every case is different, that there's something about the facts of that case or the procedure of that case that make it different, and so therefore every case is in essence an interpretation of another case because it is building on or evolving the existing case law. So what you've just now said to me is that there are cases in this category, there are cases in this category but here it's almost a confluence of these issues is what I'm -- American Pipe exists. There is case law on the issue. And defendant class actions exist, they do, because they've been -- they've been certified. So you're saying but this case is different because it is both American Pipe in the defendant class action context. So at some point I just question whether the fact that a particular case has not been decided yet, the fact that there is not something on all fours with the issue requires mandatory withdrawal of the references. If, for example, sir, there is something that is on all three's with the issue or on all two's with the issue, must I withdraw?

MR. LIVSHIZ: Well, your Honor, there's obviously a line here. And courts in this circuit have consistently held that where a question is raised as one of first impression or where the federal law is unsettled, that gets you over the barrier to requiring substantial interpretation. That is the case here and I would argue, your Honor, that when you take American Pipe Tolling, which exists in a plaintiff context and when you take a defendant class action, which as your Honor pointed out do exist and you lump them together that doesn't exist and that requires a brand new interpretation. And if your Honor looks at the rationale for American Pipe Tolling that the Supreme Court provided, that rationale specifically focused on the fact that an initial complaint filed by a plaintiff puts the defendant on notice of claims as against that defendant and the tolling mechanism facilitates some sanity in the district courts by avoiding the need for plaintiffs to file numerous individual intervention motions or opt-out complaints.

That rationale does not apply at all in the defendant class context, your Honor, we would submit, because the entire concept of a defendant class that does not name defendants, the unnamed defendants do not have notice and are therefore invoking American Pipe Tolling would rob them of their right to be free of stale claims, your Honor. We would submit that answering that question is wholesale interpretation of what the law does and does not allow.

THE COURT: All right. Let me switch, please, to the Rules of Decision Act.

MR. LIVSHIZ: Sure, your Honor.

THE COURT: How important are these state law causes of action to the adversary proceeding complaint?

MR. LIVSHIZ: Well, your Honor, I'm not going to anticipate to speak for Lehman Brothers.

THE COURT: I'll just take your argument, sir.

MR. LIVSHIZ: They must be important enough. Otherwise they would not have been alleged, your Honor, and actually the territoriality question it poses is of tremendous importance because claims such as this are alleged all the time in the federal court.

THE COURT: If they agree to drop those claims, does it vitiate one of your arguments? Let me ask the question differently.

MR. LIVSHIZ: Sure.

THE COURT: Is there a Rules of Decision Act argument for the Bankruptcy Code provisions themselves?

MR. LIVSHIZ: No, there is not a Rules of Decision Act--

THE COURT: There is simply an extra territoriality argument?

MR. LIVSHIZ: Correct.

THE COURT: Is that something Judge Chapman can handle?

MR. LIVSHIZ: That is a bankruptcy question. We would submit, your Honor, to the extent that you, and this is a point that LBSF did not oppose their opposition brief, to the extent that you do withdrawal on the basis of the Rules of Decision Act you should exercise your discretion in regard to extra territoriality questions to the Bankruptcy Code itself, if only to obviate the need for the parties to submit six briefs as opposed to three. One additional point, your Honor, if I may.

THE COURT: Of course.

MR. LIVSHIZ: In Judge Berman's decision in the LightSquared case, your Honor, he notes that the fact that certain affirmative defenses may not ultimately need to be adjudicated is not a reason not to withdraw the reference and in fact withdraws the reference on the need to consider a federal question of non-bankruptcy law.

Similarly, in the Schneiderman case, your Honor, Judge Rakoff withdrew the question to consider a question of federal law that ultimately did not have to be adjudicated and nevertheless Judge Rakoff's view of it was that the possibility that that issue would have to be ultimately decided warranted withdrawal.

THE COURT: Okay. I want to go back to Rule 23 for a moment.

MR. LIVSHIZ: Absolutely.

THE COURT: This is again a question of granularity. On the issue of typicality, how deeply in the weeds must I get on that, because I'm not being told to certify a class. Instead I'm being told that federal, but not bankruptcy law, and the issues attendant to that, attendant to precertification dominate. So what am I to look at in regards to typicality and why is it that typicality requires withdrawal?

MR. LIVSHIZ: Perhaps I'm missing the question, your Honor. I don't think at this point you have to adjudicate typicality or any other class certification questions. All you need to do at this point is to decide whether adjudication of LBSF's motion would require adjudication of non-bankruptcy federal law.

THE COURT: That's what I understand. I want to know how much do I need to consider in order to make that determination?

MR. LIVSHIZ: I think the cases in this district make clear you do not have to consider that question your Honor. The question you need to consider at this time is only the preliminary question that we just discussed.

THE COURT: There's discussion about B2 and B3 processes. Is that also you, sir?

MR. LIVSHIZ: Yes.

THE COURT: Okay. I'm sorry for Mr. Blocker. I promise, I have a couple of questions for you, but maybe I'll just let him talk.

When you talk about B3 classes what you've said is if they're certified everyone is going to opt out. If that is the case, then at some point what; we'll just have the same proceeding we have right now, which is where everybody has been joined as a defendant and they've all opted out but they all remain as defendants in the adversary proceeding? There's simply no class action? What happens if a B3 is certified? I don't think there's a way that you can force folks to stay, to refrain from opting out of the B3.

MR. LIVSHIZ: That's correct, your Honor. You don't opt out of the litigation, you opt out of the class.

THE COURT: Exactly. Would that it were so easy, sir. So assuming as you've hinted to me that everyone is going to opt out if a class is certified, am I not right back in the position that we are right now?

MR. LIVSHIZ: First of all, they're seeking non --

THE COURT: B2, I understand. They've got issues with B2. I understand.

MR. LIVSHIZ: To the extent everybody opted out, your Honor, the class would proceed on the merits with individual defendants having ability to assert their claims and their defenses.

THE COURT: And we would be right where you wanted to be if the scheduling order had gone the way you wanted it to go.

MR. LIVSHIZ: To the extent that we were --

THE COURT: The answer is yes. However, your point is much time will have passed, theoretical interest or actual interest will have accrued, decisions will not be made.

MR. LIVSHIZ: To the extent, your Honor, to the extent that it's theoretical interest, I think it's helpful to understand it in actual context of the effect that the New York statutory interest rate applies. That has the effect of increasing their claim by a two billion dollars, if paid, and that is a significant amount of money, and to the extent five more years go by, it adds another billion dollars.

THE COURT: There's been no request that they don't bill interest as this goes is going on, right? I'm thinking not. Mr. Blocker, has it been?

MR. BLOCKER: At this stage --

THE COURT: Would it bother you that this case was going on for years if it wasn't for the fact that interest was accruing potentially?

MR. BLOCKER: I don't know about that, but early on when there was a request by Lehman for a stay. There were objections filed and the objections were, fine, if they want to have a stay, but stop the interest clock. That didn't get any --

THE COURT: No traction there?

MR. BLOCKER: No traction, no ruling. They got a stay every time. It has been raised but the interest has been running.

THE COURT: Mr. Blocker, I'm going to talk to you in a moment but I have one more set of questions for Mr. Livshiz. Sir, talk to me about B2. Why does it fail?

MR. LIVSHIZ: First of all, your Honor, B2 is an inappropriate class certification device to use for monetary damages. Second of all, your Honor --

THE COURT: Actually, no. Thank you. That's exactly the point I want to talk to you about. Each of you has a different view about the prioritization of the request for declarative relief and request for monetary relief. I want to hear your view on that. I'm sure they're going to have the exact opposite but they will have the opportunity and I do want to hear it.

MR. LIVSHIZ: Sure, your Honor. First of all, I think to start at first principles I think the Wal-Mart decision from the Supreme Court suggests that 20-3B2 is inappropriate for monetary damages in any event. I think if you look at the D.C. decision in Richardson v. Delta, cited in our opposition to LBSF's class certification motion, it makes the point that where the declaration relief is simply a foundation for the ultimate award of damages the B2 certification is inappropriate and you need to certify under B3.

In any event, your Honor, the question for today is whether or not this is a substantial consideration, requires substantial consideration of federal law. There I think, your Honor, there's not much dispute that this is not a question that has been addressed by the Second Circuit, particularly in the defendant context.

THE COURT: Okay. Thank you. Let my hear from Mr. Blocker. So, this is not the first motion to withdraw in connection with the Lehman bankruptcy.

MR. BLOCKER: That's right.

THE COURT: And generally speaking they tend to fail.

MR. BLOCKER: Okay.

THE COURT: Why is your case different?

MR. BLOCKER: That's a great question, your Honor. I think Lehman cited ten cases, so I'm going to concede something, your Honor. If that is the set we're using, there have been lots of these motions that were turned down. The reason it's different --

THE COURT: I'm sorry, this is a beautiful courtroom but with poor acoustics. Please jus speak up, thank you.

MR. BLOCKER: So of the ten decisions, eight of them it was decided doesn't have anything to do with this property, so that takes care of this case. One of them is the Ka Kin Wong case, which that was a case that there was a motion to reference before BNY was decided, so that's not our case. The only other one you have is Michigan State Housing, which is a different issue.

The reason that our case is so different from all of those is a couple of things, your Honor. We've waited five years for our opportunity to be able to test these issues so we're not in the position of Ka Kin Wong back in 2009 or these other entities that got decisions right away. If you look at Michigan State Housing decision -- Lehman -- the district court judge got Lehman to concede that the issue could decided quickly and on summary judgment. That's not what you have here.

What makes our case different is you've got a lot of money at stake, a lot of parties at stake, you have years that have passed since this decision, BNY and Valley Rock were issued. None of us were parties to that decision, none of us have had any ability to impact that in any way. So now the question is five years later if we don't get that tested now or at some early juncture we're going to spend another couple of years doing discovery. Look at how many people are in the back of the courtroom. That's how many people are going to be participating in discovery. It will be years, millions of dollars spent. That's what makes this case different. That's what makes this case unique. If there was ever a candidate for withdrawal it seems like this is it. We really got guidance from the bankruptcy court on the bankruptcy law issues. You've got gobs of money at stake and a long time has passed.

THE COURT: You said to me in your briefing this isn't forum shopping.

MR. BLOCKER: It's not forum shopping, your Honor.

THE COURT: You've argued to me that one reason I should accept this case and allow the withdrawal is because you already know what Judge Chapman is going to say. So on some level, come on, in a quiet moment, isn't it forum shopping?

MR. BLOCKER: I'm not going to concede that. I understand your Honor's, point but it's not forum shopping. Ultimately -- first of all the bankruptcy court there's no real dispute here the bankruptcy court cannot enter a final judgment on all of the claims, so this case is going to come up to the district court and have to be resolved in any event at some point. Why is it forum shopping for us to ask for that to happen now as opposed to three years from now.

If you look at some of the opinions we cited, like in Development Specialists, Judge McMahon specifically said it's not forum shopping if you're going to the Court you're going to end up at anyway. That's where we're at. It's not forum shopping.

THE COURT: There is something weird about the fact that, and I know we've talked about this earlier, the real issues here are bankruptcy issues. I would like I think, any district judge would like to have the wisdom of a bankruptcy judge on these issues and I think you know because you've read the same opinions I have, oral and written, that one thing that is cited frequently by the district judge is denying motion to reference is the expertise of the bankruptcy court and the long time that the Lehman bankruptcy proceedings having going on in the bankruptcy court.

So there is that. I have to say those arguments do resonate with me. We've talked about how you think I should know already or at least there's a substantial likelihood of where Judge Chapman is going to go. I'd like you again to respond to why it doesn't make sense for me to let a Court that has had this case for years continue to resolve the case.

MR. BLOCKER: Well, I go back to what I said before, your Honor, and I believe this, which is in the normal circumstance where the question is teeing something up for the bankruptcy court, it's a bankruptcy law issue. I understand your Honor's point you want to get the guidance from the bankruptcy court and that's the usual grounds on which these sort of permissible motions are denied; I want to hear from the bankruptcy court I want to get the bankruptcy court's guidance. Here's the issue. What do you do if you already have the bankruptcy court's guidance? That's what we're teeing up here. Judge Peck ruled, Judge Chapman has said for better or worse this is the law of case. You have guidance from the bankruptcy court. Whatever you're going to get from the bankruptcy court you've got.

We wouldn't necessarily agree that the main issues here are bankruptcy law issues. You have guidance on that. What you haven't got guidance on is all the various claims that the bankruptcy court can't enter final judgment on; the state court claim, there's a number of final conveyance claims which the Court has made crystal clear bankruptcy court cannot enter final judgment on. So you have the bankruptcy court's guidance on whatever issues are really critical. Now you have a bunch of issues that the bankruptcy court cannot enter final judgment. Under those circumstances why should we wait? Why should we go through another proceeding? It's almost like going through grounds of BNY. Why should we do that? We have the answer the bankruptcy court has given. Your Honor can take that to another court and make their own decisions, but the only question that is going to come up is, is it more efficient to do it now or two or three years from now after we spent all the money going through discovery or summary judgment or whatever will come up.

THE COURT: Mr. Blocker, I have a few questions on permissive withdrawal, but I don't think you want to think I favor Mr. Livshiz. I want you to know there are things I have in mind as I consider the permissive point. I'd like to hear from you on that now.

MR. BLOCKER: Oh, this is free form?

THE COURT: Yes. I'd like you to extemporize or tell me it's all in the briefs, because I have read them.

MR. BLOCKER: I do think it's all in the briefs, your Honor. We made clear why we think the Orient factors here cut in favor of a permissive withdrawal reference.

I want to go back to a question you asked Mr. Livshiz that I want to be clear about, okay? You asked him essentially what do want me to do here, should I withdraw. The answer is you should withdraw the whole adversary case. You should take the entire case. The quickest way to get to a final conclusion in this case is for your Honor to is that the whole thing. We think you can do that either on a mandatory basis or you can do it on a permissive basis at a minimum. On a mandatory basis, we would submit that's a decision for your Honor, but let's be clear, we think you should take the whole adversary case. Let's accelerate the process. Why wouldn't Lehman want to have a decision sooner rather than later? If we're going to have a decision in the bankruptcy court and have to repeat it or repeat large portions of it in this court, that doesn't seem as efficient to me, especially given the passage of time we have here. Make no mistake here. We will have the entire adversary proceeding withdrawn.

Unless you have any questions for me I'll sit back down.

THE COURT: Just a few follow-ons to that. One of the decisions that were submitted to me in connection with this motion, Judge Sullivan's decision, I don't remember exactly the case, he reminded the parties with tongue firmly planted in cheek that the parties can always consent to have the bankruptcy court decide the issues finally, basically the post-Stern view of what a Court could consider could be obviated. So you know you have that ability, right?

MR. BLOCKER: I do. I only speak for my own clients, considering who are behind me, but I don't think my client would consent.

THE COURT: Is there any way, and you'll excuse me for trying to think out of the box, it usually fails, but is there any way to stipulate or otherwise accelerate the process through which the BNY decision could be decided short of the process that's now been set forth in the scheduling order or withdrawal of the reference? I understand those are the two options that have been given to me. I want to know is there anything else that can be done to get that decision up to the -- I presume -- you say you want me but you really want the Second Circuit to decide. They have more precedential value than I do. Is there any way of getting it to them?

MR. BLOCKER: I asked the question, I canvassed colleagues -- like you said, people behind me are shaking their heads -- maybe I'm not thinking outside of the box, how exactly to get that done. When you say that to me, my answer is we could have done the scheduling order a different way in the bankruptcy court, maybe taken an interlocutory appeal, but that's not available to us. That's not a lock that we would get an interlocutory appeal that I know of.

In any event, there's no immediate mechanism that I'm aware of to get this up to the Second Circuit.

THE COURT: In my prior life in criminal law we had trials on stipulated facts but I do appreciate that if you lose on a trial on stipulated facts you and your clients are looking at quite a large number, and I just don't think, I can't imagine you wouldn't want to test that. So I understand it. I've been racking my brain trying to find another solution.

MR. BLOCKER: I mean, and so in Michigan State Housing there was a request to withdraw a reference, which was denied -- so why am I bringing up the case? The judge did look in precisely the way you are for a way to get things done quickly. I think it was Judge Koeltl, but I could be wrong.

THE COURT: I believe it was he as well.

MR. BLOCKER: What he did, he extracted I'll say concessions from Lehman that, A, it could be decided on summary judgment; B, they wouldn't argue there were factual issues, C, it would be done quickly. In those circumstances the Court said, okay, you can file a motion for summary judgment in the bankruptcy court, I'll get to review that pretty quickly.

THE COURT: I thought Judge Koeltl's point, which I thought was clever, which was you could bypass him and go directly to the Second Circuit. His point was if we want the this done quickly I'm a speed bump on the way to ultimate resolution of the case so just go directly to the Second Circuit and I believe the parties conceded that that could be done.

I guess the issue that I think you're saying is it's a little late for that given the scheduling order's occurred on this stance.

MR. BLOCKER: The way it occurred in the bankruptcy court, it is what it is, your Honor. Contrasting Michigan State Housing, because the district court judge was sensitive to the notion that there was a reason to try to speed things up. If nothing else about our motion you should understand we're trying to speed things up. We want a review of BNY, we want to move these up because we do think we're on solid legal ground, we want to get it adjudicated. I don't have an out-of-the-box solution standing here quickly on my feet, another solution.

THE COURT: You've had several years, with no slight intended, sir. There are a lot of people in this room and no one has come up with anything else. There may not be an alternative.

MR. BLOCKER: That makes me feel better. In any event, that's my pitch, your Honor, unless you have any further questions.

THE COURT: Not at this time.

Okay may I ask who from the front table? All right, Mr. DeFilippo. I have questions for you but if you want to begin by commenting on the many questions I've asked your adversaries, I'd be happy to hear from you now.

MR. DeFILIPPO: Yes, your Honor. I would like to do that. Thank you. First of all, on the U.K. law issues you addressed, there are only two deals in this case that are governed by U.K. laws, so it's not a huge factor for your Honor to concern yourself with.

Secondly, during the three and a half years the case was stayed we did discovery to ascertain the identity of the note holder defendants which we did not know when we filed the case. That's why we had as many as several hundred. We now have about 140 left because we were able to figure out who they were and join them and we've managed to join them all within the 6-year statute of limitations which applies to most of our claims, which is going to be an important thing when we get to the whole American Pipe Tolling issue. I'm sure you have questions for me about that, but I'd like you to keep that in mind.

We think that the defendants could have taken an interlocutory appeal or at least applied to take one from the scheduling order and determined for whatever reason not to do so.

THE COURT: Is it too late now, sir?

MR. DeFILIPPO: I'm not prepared to give that advice, your Honor.

THE COURT: Give me advice, sir.

MR. DeFILIPPO: I don't know. Probably yes, I believe it is.

THE COURT: Okay.

MR. DeFILIPPO: Just like they think the safe harbor 560 protects them, we think Judge Peck got it right. His decision is short, but if you look at what the words that 560 said, it only protects liquidation, determination or acceleration of a stock. This case is about the distribution of the assets of the 45 CDO's or issuers that basically turned over the property they held for the benefit in the first instance of LBSF to the note holders solely as a result of the LBHI bankruptcy filing, which makes it a clear ipso facto violation if you look at 365(e)(1), a contractual provision that modifies or terminates a debtor's rights solely because of the commencement of a Title XI case is unenforceable and that's what this case is about.

THE COURT: I'll stop you for a moment, sir, because what they tell me is no, no, no, it did not flip priorities as much as it established considerations under which each priority was a priority. You disagree with that.

MR. DeFILIPPO: Your Honor, the only reason the flip law was implemented was because of the LBHI bankruptcy. We have notices of determination for every single trustee as well as every single issuer and the reason given in every case is because of the Lehman bankruptcy.

THE COURT: Could you give me a little more color on your arguments on the applicability or not on the safe harbor? What you said is Judge Peck relied on the fact that by its terms the provisions applied to provisions that dealt with the liquidation, determination or acceleration.

MR. DeFILIPPO: Right.

THE COURT: Why isn't that what the flip clause is?

MR. DeFILIPPO: The flip clause is a modification. We originally had priority. Each of the debt investors had an order fall and in each of the order falls Lehman had priority over the note holders.

THE COURT: Because the transactions were then in the money?

MR. DeFILIPPO: Yes and if the transactions are in the money we get paid first on termination unless termination is a result of a default by Lehman. The default by Lehman is the commencement of a bankruptcy case. 365(e)(1) of the Bankruptcy Code says that cannot be the basis for modification of rights. The modification of rights was the flip of priority. That's Judge Peck's decision in a nutshell and because 560 only applies to liquidation, termination or acceleration, we are free to sue to recover for wrongful distribution of collateral.

THE COURT: Can you explain to me where 560 would apply? Could you give me an example of where the issue in question is in fact liquidation, determination or acceleration?

MR. DeFILIPPO: We're not contesting their right to terminate the swap which they did; termination. We're not contesting their right to accelerate the notes, which they did; acceleration. We're not contesting their rights to liquidate the collateral, which they did; liquidation. We are contesting their rights to take that collateral and distribute. That is not covered by the literal terms of 560. That's Judge Peck's decision. We think it's right, however, while they think it's wrong. They are not prepared to concede that it applies to them. So it's a little bit of doublespeak here, with all due respect to my colleagues here on the defense side, your Honor.

THE COURT: How so?

MR. DeFILIPPO: They want you to take that decision over which the bankruptcy court has final adjudicative authority, no question about that. Many of the claims in this case are well within the bankruptcy court's ability to decide. As your Honor knows from sitting as an appellate court from the bankruptcy courts, bankruptcy courts maintain the power to make decisions and final decisions on issues of bankruptcy law like whether 365 applies and whether this is an ipso facto clause; whether 560 applies or whether they were protected by it. Whether they violated the automatic stay by distributing post petition, whether the money distributed was property of the estate. Bankruptcy court has plenary power to make those determinations and all the cases tell us that your Honor should let the bankruptcy court do its job. Let the bankruptcy court decide the issues that it can decide and let it render findings and conclusions on the issues it can't.

In an excellent decision by Judge Rakoff, Kirschner v. Agoglia, he actually said that and we think it's appropriate for your Honor's consideration in this case.

I had additional --

THE COURT: That's fine, although I do -- I'm on a tangent right. Now I want to finish it, please. Can you explain to me how Judge Peck's Michigan State Housing Development Authority fits into all this? You heard Mr. Blocker and I wrestle with the word harmonizable. I imagine you can harmonize them, sir. Tell me how they are.

MR. DeFILIPPO: Calculation is part of liquidation. You can't liquidate unless you can calculate the amount of the value of the collateral.

THE COURT: All right. Now go ahead and tell me what else is on your list.

MR. DeFILIPPO: One of the last questions you asked I think to Mr. Blocker I think you got an answer to, and that is we could consent to the immediate review by the Second Circuit from any decision by Judge Chapman on the issues that they've asked you to withdraw.

THE COURT: But you understand, sir, that it would be a pity to get that done after a year, two years or whatnot, of class certification litigation. I think that's their argument.

MR. DeFILIPPO: But, your Honor, class certification is ready to argue. The briefing is done. We're just waiting for a date. Somebody tried to file a sur reply.

THE COURT: Yes, I heard the word sur reply.

MR. DeFILIPPO: It shouldn't hold things up at all. It's going to be decided whether or not --

THE COURT: But won't that, sir, then be the subject of some bankruptcy appeal, will they not be able to appeal the decision to certify the class?

MR. DeFILIPPO: Interlocutorally?

THE COURT: Yes.

MR. DeFILIPPO: It depends on what the decision is, your Honor. But the point I think you're trying to make is, is there a likelihood of further delay.

THE COURT: That is my point, yes.

MR. DeFILIPPO: The point I think you should take from this is, this is a case about documents. This is not a case where the credibility of witnesses is going to be at issue. This is not a case where there are going to be 50 or 60 note holders coming up to testify as to what happened. The documents tell the story in this case. There are indentures, there are waterfalls, termination notices, distribution reports. This is principally the evidence in this case. It's not going to be a tremendous amount of discovery. We had one witness for class certification. One. Class certification is not going to be an extraordinarily fact sensitive analysis either, we don't think. We think there are tremendous similarities among all the documents, and, you know, the issues that we have to show commonality about we think we have, and that is are these flip clauses ipso facto clauses. That's really the key to class certification.

THE COURT: Go ahead. Now tell me if there are other things.

MR. DeFILIPPO: I think, your Honor, those are the points I wanted to respond to that you asked our adversaries.

THE COURT: Let me ask this, sir. Again, I may be speaking in my own ignorance but I'll ask the question nonetheless. This adversary proceeding was not filed until BNY was decided. Why hadn't LBSF thought to bring an action against the note holders before that decision was issued? You didn't know where Judge Peck was going to come out, but I'm surprised that you -- I'll say it this way. If I didn't know more, I would say that you didn't think you had the argument until he gave you the argument, so I'm sure that can't be the case. Why don't you tell me what happened?

MR. DeFILIPPO: I think, your Honor, BNY was decided in 2009 and this case was filed in September of 2010.

THE COURT: Yes. But the bankruptcy had been going on for several years beforehand, correct?

MR. DeFILIPPO: Since September of 2008. It was a very complex bankruptcy with tremendously knotty issues and I think that even though my firm was not integrally involved in the formulation of the Chapter 11 plan, I think the debtor's principal focus at that point in time was trying to get out of bankruptcy, was trying to get a plan confirmed, was trying to negotiate with an enormous number of creditors with disparate interests and to try to bring them all together was probably the main focus of the debtors' efforts until that was accomplished. As you know, there was I think 600 billion in assets in the case and hundreds of thousands of creditors and there were a lot of fires going on. I'm speculating at this point but --

THE COURT: You don't know.

MR. DeFILIPPO: I really don't know.

THE COURT: Then I will not ask you for what you do not know.

Something, sir, that sort of resonates with me is that you have identified the vast majority of the folks who would be the members of the class. There are a number of them in this adversary proceeding. I appreciate what you're saying in that there are folks who have not been able to be identified because they're perhaps in other countries or there are efforts made to protect their identities that have remained successful but I really would like to understand what you hope to achieve from the class action process and all the attendant knotty issues that inhere in Rule 23 and the certification rule that you couldn't just do by keeping the adversary proceeding in its current form.

MR. DeFILIPPO: Your Honor, as you've heard, and as you've read, a lot of these defendants, and I want to mention that this group in the courtroom is I think less than half of the total note holder defense group. There's 140 of them, so --

THE COURT: There's more.

MR. DeFILIPPO: Right. I think at most 80 have participated in the case. There are 60 who have been dormant. So our objective by seeking class certification is simple. We want to determine liability or not against the largest number of note holder defendants possible. And we do not seek to certify a non-opt out damages class. That is a misrepresentation of our position. We seek a hybrid class non-opt out for liability, opt out for damages. That's clear from our papers. If not, please allow me to make it clear at this point.

THE COURT: I understood that, but is it a B1 B3 or B2 B3?

MR. DeFILIPPO: Either one, your Honor would be fine. We're not at that.

THE COURT: I'm not sure I've seen a B1 B3. We'll talk about that later. Even in connection with the certification motion the number of briefs filed by your adversary is quite small. I guess it's surprising to me that the parties couldn't decide or Judge Chapman couldn't decide to save the drama by limiting the number of briefs that one side could file.

MR. DeFILIPPO: Your Honor, when we originally moved for a scheduling order we tried to do it that way. We asked that the Court appoint a liaison counsel for the defendants and an executive committee and the defendants opposed that. They were not willing to be governed by the Court. They wanted to self govern and as a result we have a fragmented group. More than half are not here. Half are here arguing sometimes for the rights of those not here.

THE COURT: They're not arguing for the 60 who aren't here or the approximately 60 who aren't here?

MR. DeFILIPPO: They are arguing for themselves but their argument in American Pipe Tolling are for the people who are not here.

THE COURT: There have been suggestions by your adversary that are there are due process ramifications to your inability to identify all the members of the class. What percentage of this class, the putative class, has been identified? 99 percent?

MR. DeFILIPPO: No, your Honor. I think we've identified, well, we've dismissed out as a result of the mediation process that went on during the three-and-a-half-year period, we settled about a billion dollars worth of claims in this case and we've dismissed out the commensurate number of note holders, so excluding the dismissed out note holders we think there are about 40 who have not been joined but who are known, and an unknown number who have not been joined and who are not known. But the unknown number only represents, to the best of my knowledge, about $40 million worth of distributions.

THE COURT: That's the unknown.

MR. DeFILIPPO: That's the unknown and unjoined as opposed to the known and unjoined.

THE COURT: May I ask why the known but not joined have not been joined?

MR. DeFILIPPO: They were identified very late in the process, your Honor, in connection with some of the litigation over the motions to dismiss by uniquely situated defendants. So we just haven't gotten around to it yet.

THE COURT: Your belief is that there is no limitations issue because of American Pipe?

MR. DeFILIPPO: I didn't necessarily say that, your Honor. We just haven't filed the motion to amend yet as to them. We've been pretty busy on other things.

THE COURT: I would not doubt that, sir. The issue, what was suggested to me, was that there were three amendments to the original complaint and each time where folks are being added. So as to these 40, they haven't had any appearance before Judge Chapman, they may be subject to what's going on in this litigation over the certification of the class and they're kind of out of luck in terms of their ability to participate. Or maybe not.

MR. DeFILIPPO: Your Honor, I don't want to predict whether we'll make a motion to amend to add them or not at this point, but they do, we're pretty sure they know about the case, because the way we found out about that is through discovery of nominees for them who presumably have been giving them information about the case since the nominees have been joined, and the nominees hold notes on behalf of these unnamed parties. So it's not like this case will be a surprise to them when it finally appears on their radar, which may make relation back a relevant consideration.

THE COURT: On the issue of the unknown and unjoined, is your view at this point that they're just never going to be known and never going to be joined?

MR. DeFILIPPO: We think, your Honor, that the answer to that is it's very difficult to cut through the privacy laws of the jurisdictions in which those parties, those potential parties reside absent a judgment of a U.S. Court. Once a judgment is entered we think we might have a little better luck getting access to their identities.

THE COURT: Okay. There's a statement in your brief that I'd like a little bit of clarification on. And what you say is, joinder is not practicable because the size of the note holder class is so big that the ability of an individual note holder to participate would be minimal. It gives me a little concern that you say an individual note holder has a minimal right to participate. Explain that to me, please.

MR. DeFILIPPO: Your Honor focused on that a little bit in questioning our adversaries. That is, are there going to be 140 motions to dismiss? How in the absence of class certification, how will whatever ruling comes out on the bankruptcy law questions, the BNY and the other things, automatic stay and property at stake, how will they be made applicable or binding on the maximum number of defendants if we have 80 people standing on the sidelines? So it's hard to envision how we go about doing that unless we bring a summary judgment motion on those points against all of the note holder defendants and then wait for the arguments that the factual issues are too material to permit that to happen. The dormant defendants we don't anticipate will file motions to dismiss so at most we'll have 60 motions to dismiss and 80 people hanging out there.

THE COURT: Sure, but once again, does Judge Chapman have no way to, as a matter of her ability to control her docket, has no way to limit the number of briefs that are filed or the number of motions that are filed?

MR. DeFILIPPO: We think she does, your Honor, but last time we tried that we were not successful in achieving it.

THE COURT: You were not successful in getting the defendants to agree to it is what I think I heard you say.

MR. DeFILIPPO: We asked that it be imposed.

THE COURT: I see. And she declined.

MR. DeFILIPPO: She was persuaded that the defendants could self govern at this point, although she did reserve the right to change her mind later.

THE COURT: Okay. On the actual merits issues in this case, the BNY issues, there's a little bit of to'ing and fro'ing as to the degree to which Judge Chapman is or will act as though she is bound by those decisions. I have read the transcript provisions where she believes they are very likely to be law of the case but you keep calling to my attention her statement that of course she will decide these cases in accordance with their facts. So what is it, is the point that you believe she will come out the same way but she will not reflexively adopt Judge Peck's reasoning, she will simply come to see the correctness of that reasoning?

MR. DeFILIPPO: Your Honor, we think Judge Peck's decisions are correct and we are hopeful that Judge Chapman will share our views on that. We also think that a factual record has to be made before those issues can actually be cited and we have not made that factual record before her. We need to put into evidence all of these flip clauses. We need to put into evidence all of the other documents that we say are dispositive of the issue. She needs to decide whether in fact as we argued there are insignificant differences between the documents and they are all sufficiently similar to constitute ipso facto clauses. There may be intervening legal decisions that none of us contemplate before she does that, which might change her view.

THE COURT: What might those be? Where might those come from?

MR. DeFILIPPO: I don't know what other Courts around the country might be prepared to consider this issue, your Honor.

THE COURT: Are you aware?

MR. DeFILIPPO: I am not aware, but I can't --

THE COURT: I'm not suggesting that you would know what's going on in every bankruptcy court. I'm saying that perhaps bankruptcy law reporters or people might be talking about these issues percolating in other courts. Are you aware of these issues percolating in other courts?

MR. DeFILIPPO: Not specifically, your Honor. We think Judge Chapman needs to make a record before she rules and -- I may have lost the thread of your question, your Honor. Would you help me get back to it?

THE COURT: Of course. The issue is your adversaries have expressed concern to me and have expressed their belief that the statements of Judge Chapman have indicated her inclination to abide by the BNY and Valley Rock decisions and with that in mind, why shouldn't I just basically take the opportunity now to allow for the withdrawal of the reference because this is not a situation, as is frequently the case, where the district court needs to wait in order to benefit from the bankruptcy court's reasoning.

MR. DeFILIPPO: Well, several answers to that, your Honor. First of all, this is in the context of permissive and not mandatory withdrawal, because none of those matters involve the substantial interpretation of bankruptcy federal law, regulating organization or activities affecting interstate commerce. So the issue then is does the fact that there are decisions from the bankruptcy court and the record which haven't been ruled on, the issues in those decisions haven't been ruled on in this case yet, does that mean you should take away the bankruptcy court's power to adjudicate issues over which she has final adjudicative authority. And I think the law says you shouldn't. I think the Arkinson case from the Supreme Court says even in non-court cases the better practice is to allow the bankruptcy judge to render findings and conclusions to the district court subject to de novo review. It's even more important that the bankruptcy court be allowed to decide issues of bankruptcy law which are core and which are not foreclosed by decision by Stern when those issues are presented to the bankruptcy court in the first instance. You do not have a decision of Judge Chapman on these issues. You have some decisions of Judge Peck, two of which go our way, one of which doesn't. I would suggest, your Honor, that it may be appropriate to get a decision of Judge Chapman which might inform your Honor's thinking on the issue even further than it has been.

THE COURT: Okay. I guess my concern is if that's all there were, I would understand exactly what you're saying and I wouldn't push back as much, but there is this antecedent question of class certification. It's not to suggest that Judge Chapman doesn't know how to do it. Of course bankruptcy courts know how to do it. There are some interesting issues here including the issue raised by what you're in fact suggesting that what you're seeking is a hybrid class certification. Given that, can that piece of the case be broken off? Can I withdraw just a part of the reference when it comes to class certification and give it back to her for the merits issue?

MR. DeFILIPPO: That's an interesting issue of statutory interpretation under 157(d), your Honor. As you know, the first sentence says you can withdraw in whole or in part the proceeding and second sentence you can withdraw the proceeding. I don't want to dig myself a hole here.

THE COURT: I'm not saving I'm volunteering to do this. I'm just saying I want to be clear I understand what I can do.

MR. DeFILIPPO: I think you have the power sua sponte to do whatever you want here really and I'm here to persuade you that you shouldn't do anything.

THE COURT: Okay, but let's talk about defending class actions because that's what this is and the parties can differ as to the degree to which they believe that the fact that it's a defendant class action causes or should cause me to think more of or less of certain decisions and particular topic matters. I will say, and I'm sure you've seen this as well, the law on defendant class actions I'm not suggesting is perfectly consistent. There are a few things that come out, though. There are real concerns about due process, especially those that inhere in the certification process. There's a question about the adequacy of representation, there are questions about notice, opportunity to be heard, personal jurisdiction and I suppose superiority as well. Those to me are federal non-bankruptcy issues. And so while I certainly, again, I have every trust in Judge Chapman's ability to do this, I just wonder if there are, if there's such at least in the first stage of this litigation such a focus on non-bankruptcy issues that withdrawal of the reference is appropriate.

MR. DeFILIPPO: I think, your Honor, there are two answers to that. The easy one is that we think Judge Chapman is well equipped to decide those questions since they are not that difficult with perhaps the exception of the B2 class. But the statute is pretty -- the rule is pretty clear on what has to be done and we think Judge Chapman can read the rule. Other bankruptcy courts have certified defendant classes and we've cited you those cases including Integra out of the Tenth Circuit.

THE COURT: Weren't those classes classes where there was a limited pool of assets and there was a concern that if you did not have the class certified that money might run out?

MR. DeFILIPPO: No, I don't think so at all, your Honor. Some of them were cases just like this one where the trustee was trying to recover from a group of recipients of transfers that were avoidable.

THE COURT: Okay.

MR. DeFILIPPO: So I think, first of all, we don't think that the Rule 23 issues you've just identified rise to the level of substantial and material. We think they're routine and that the bankruptcy court has the ability and should be allowed to decide that.

THE COURT: So in your estimation this would just be an instance of Judge Chapman applying the law as opposed to interpreting it in the first instance?

MR. DeFILIPPO: Absolutely correct, your Honor.

THE COURT: And you saw extensive discussion between Mr. Livshiz and myself about the degree to which there are new novel precedential issues or at least novel issues. You disagree with his assessment of them?

MR. DeFILIPPO: Yes. I didn't hear too many of them except for maybe the B2 hybrid class issue.

THE COURT: Well, American Pipe in the B2 setting. I'm sorry, in the defendant class setting.

MR. DeFILIPPO: All due respect, your Honor, American Pipe does not arise in class certification. That's not an issue that comes up until motions to dismiss in a future phase.

THE COURT: Could they not argue that there's a dissimilarity among class members because some of them will have this defense and some will not?

MR. DeFILIPPO: They've already argued that, that some have individualized statute of limitations. I could probably take a sideline here and explain why we think that American Pipe is not the momentous issue they make it out to be.

THE COURT: Yes. Please tell me.

MR. DeFILIPPO: Every one of the people in this room and every other note holder defendant was sued within six years of the Lehman petition date. If you look at the counts in the complaint only four of them have a two-year statute of limitations. Every other one of them either has no statute of limitations like a claim for turnover or has a six-year statute of limitations. The two-year statute of limitations arise with respect to the avoidance action claims, the preference, the two fraudulent transfer claims and the 549 unauthorized post petition transfer claim. And 549 is two years, not from the petition date, from the date of the transfer. So this is a limited subset of claims, first. Secondly, we sued every single one of the trustees within two years of the petition date and the trustees were the first recipients of the transfers. Not the note holders. The money went from the issuers to the trustees to the note holders. We sued the trustees within the applicable statute of limitations for avoiding the transfers to them. So it's not an issue with respect to statute of limitations for the avoidance actions because 550(f) of the Bankruptcy Code gives you the right after you avoid a transfer to sue the recipient of a subsequent transfer for one year. So American Pipe Tolling is really applicable to the unnamed note holders. The rights of the unnamed note holders are not the job of this group to defend. Although I understand your Honor can consider them. But this is not that big a deal.

THE COURT: Mr. DeFilippo, I have some more questions for you, but I do have this unfortunate habit of forgetting how long I've been going. I've been going for two hours. I want to take a ten-minute break, recognizing we do want to finish promptly, let's take ten minutes and we'll come back.

(Recess)

THE COURT: Mr. DeFilippo, one of the things that I found odd and still find odd about the movant's position is that they've told me that there are all these very significant non-bankruptcy issues that I should, which form the reason why

I should withdraw the reference, but then I just don't have to decide them and I can decide them at the bankruptcy issues. I guess yours is the converse of that, because what you're saying is I can avoid certain knotty legal issues such as the Rules of Decision Act or extra territoriality by focusing on the Bankruptcy Code provisions that you say do apply extraterritorially such as Sections 362, 541 and 542.

I guess my first question is, this seems to be sort of a convergence, right, because there are issues of bankruptcy law and there are issues of extra territoriality, so your argument, sir, is that Judge Chapman is better suited to handle those? I mean, because how much does extra territoriality or the extra territorial application of Bankruptcy Code provisions come into play in bankruptcy courts?

MR. DeFILIPPO: Well, your Honor, there are some Bankruptcy Code provisions that do apply extra territorially and some that don't. We acknowledge that the avoidance claims have been held not to apply extra territorially and sometimes they do, but the point of that is that there are many other potential remedies available to us that do apply extra territorially. For example, the automatic stay applies all over the world and a violation of the stay is void ab initio, which means the Court can enter an order declaring it's as if the act never occurred that violates the stay which would allow her to also order the parties that violated the stay to return the property they got in violation of the stay without ever having to reach the issues of 547, 548 or 549.

THE COURT: Now, I think you said to me that only two of the swaps transactions involved U.K. contracts, is that correct?

MR. DeFILIPPO: That's correct, your Honor.

THE COURT: So is it your view that in terms of your ipso facto issues or your safe harbor issues none of those implicate extra territorial issues because the contracts are domestic?

MR. DeFILIPPO: On the ipso facto, our argument is that extra territoriality is not implicated or stated differently that 365 and the other sections of the Bankruptcy Code that deal with ipso facto clauses apply to extra territorial conduct because the plain language says that they apply to any contract of the debtor. It doesn't matter where the counter party is located. If the debtor has a contract with a person in the U.K., 365 applies to it. So it's not like you have to --

THE COURT: Is it that simple, sir, and I ask this because again, in a criminal case I had, Volar, talked about extra territorial application after Morrison, thinking about Bowman and presumptions like that, you're saying the inclusion of that word "any" should be taken to reverse what is sometimes a presumption against extra territorial application?

MR. DeFILIPPO: I may have gone a little far with that one, your Honor, to be honest with you. 451 says wherever located and by whomever held, that is clearly a worldwide application. An automatic stay is clearly a worldwide application. Our argument is that 365 has worldwide application because otherwise how can the bankruptcy court do its fundamental job of administering the property of the estate if it could not deal with contracts where the debtor before it was a party and the counter party was in a foreign country? You can't do it any other way. You have to be able to handle the contracts of the debtor if you're the bankruptcy court.

THE COURT: Sure, but we're talking about 560 and the safe harbor provision, that's -- I don't have to be concerned about the fact that some of the contracts may be abroad?

MR. DeFILIPPO: No, I don't think that's a question at all. Your Honor, before you ask me another question you had asked a couple of questions before the break that I didn't have full answers to.

THE COURT: All right. Well, I'll take all answers.

MR. DeFILIPPO: I now have them. The first one you asked is why do those issues like due process, adequacy notice, personal jurisdiction and superiority, why should the bankruptcy judge be allowed to handle them. And I think that I only partially answered that.

(Continued next page)

MR. DeFILIPPO: The other reason is that they are not laws regulating organizations or activities affecting interstate commerce.

THE COURT: Yes. Look, your adversary tells me that your fixation on interstate commerce is unwarranted. I imagine you disagree with them. There are other instances in which courts have considered matters that are not specifically such on interstate commerce.

MR. DeFILIPPO: They are talking about the Judge Rakoff decisions in the Madoff case.

THE COURT: I believe they are.

MR. DeFILIPPO: With all due respect --

THE COURT: To whom?

MR. DeFILIPPO: To Judge Rakoff.

THE COURT: Okay.

MR. DeFILIPPO: I respect for you is unquestionable, your Honor.

THE COURT: Very good. You realize Judge Koeltl basically castigates people who say "with all due respect" because he wonders who it is due.

MR. DeFILIPPO: Those decisions contain no analysis or reasoning about the interstate commerce language. None whatsoever. In order to follow those decisions, you have to stop reading 157(d) before the interstate commerce clause of that statute. That would violate the principle of statutory construction that you must give effect to all the words in the statute when you are interpreting it. That is a basic principle of statutory construction. You cannot ignore the interstate commerce language. There are two important pieces of legislative history of that statute and it all dovetails with this whole theory that substantial and material consideration is required of non-bankruptcy federal law. If you look at these two pieces of legislative history, one is the House congressional record in March 21st, 1984, and the other one is the Senate report 98-55, both of which are considering the bankruptcy court and federal judgeship acts, which became 157(d) that both of them say that the interstate commerce language in there has to be narrowly construed and together with the requirement that the statute itself has to be narrowly construed means we have a double narrow construction required of mandatory withdrawal.

In addition, your Honor, if you look at Title 28 you'll find at least five sections of that statute. I have a list of them if you care about it.

THE COURT: I do.

MR. DeFILIPPO: But five sections, which use the words "Constitution" or "laws of the United States." There is another principle of statute construction that says that when Congress leaves a word out and they use it in another section of the same statue, it is presumed they did so intentionally.

Here they left "Constitution" out of 157(d) and it is presumed they did so knowingly and intentionally.

THE COURT: Tell me what those sections are.

MR. DeFILIPPO: I am, your Honor. I have them and perhaps I can get it for you --

THE COURT: Later. Fine.

MR. DeFILIPPO: So the second question I was going to respond to was your question whether there are other cases around the country dealing with the ipso facto issues. I am informed that both the Valley Rock and the Michigan cases are still pending. They have not been concluded. They can result in intervening decisions that affect Judge Chapman's decision in this case.

THE COURT: Where are they procedurally?

MR. DeFILIPPO: Mr. Dahill knows.

MR. DAHILL: Your Honor in the Valley Rock case, the second amended complaint was recently filed in September of this year. So that case has just moved beyond that stage.

THE COURT: I am sorry. This is the same Valley Rock case of how many years ago?

MR. DAHILL: The case.

THE COURT: Wow.

MR. DAHILL: It is still pending. The Michigan Development Authority case is still pending as well. My understanding there is not much activity in that case.

THE COURT: Do you have a sense, sir, of why there is not much activity in this case?

MR. DAHILL: I don't, your Honor. I tried to endeavor to get some information during the break.

THE COURT: Thank you. Please continue.

MR. DeFILIPPO: That was the full extent of what I needed to respond to that I hadn't responded to earlier, your Honor. So I am ready for your next question.

THE COURT: I would like to talk to you a bit more about extraterritoriality. The Rules of Decision Act that as been argued apply in particular to your state law claims. Would you divest yourself or give up these state laws claims to save yourselves concerning the Rules of Decision Act? I don't know the answer.

MR. DeFILIPPO: Well, your Honor, the statute is like one sentence long and we all know that there is an adverse presumption against extraterritorial application and I don't think that that is one of those statutes Judge Chapman has any difficulty applying to the facts before her. There are no facts before her yet. So we need a record before we can decide what conduct is going to be immunized against attack by virtue of that statute.

THE COURT: Do you agree, sir, there is at least a possibility that a court, some sort either, a bankruptcy court or district court, could find that certain of the state law claims would not have extraterritorial application?

MR. DeFILIPPO: Of course I concede that, your Honor.

THE COURT: How many foreign defendants -- maybe that is the wrong way of looking at it. I will try it this way: How many foreign defendants are there in the adversary proceeding?

MR. DeFILIPPO: I cannot answer that off the top of my head. About 50 percent.

THE COURT: But your view is that even as to those defendants much of the conduct occurred or had some connection with the United States such that it would not be an extraterritorial application of U.S. law.

MR. DeFILIPPO: Either that or more importantly the U.S. laws apply -- the Bankruptcy Code sections apply to them outside the U.S. whether or not the state claims apply to them outside the U.S. remains to be seen.

THE COURT: I am having some difficulty. This may be more the fault of Wal-Mart than any of the briefing here, but I would like to understand whether Judge Chapman or me or any judge can certify a (b)(1) or a (b)(2) defendant class action. So you've heard from your adversaries, their views on the issue and I think it breaks down for them between declaratory and monetary relief. I would like to hear your views on that.

MR. DeFILIPPO: The Second Circuit affirmed the certification of a (b)(2) defense class in Brown v. Kelley.

THE COURT: What kind of case was that? Was that not a public officials case?

MR. DeFILIPPO: Yes, it was.

THE COURT: Where I saw that the Second Circuit may be just because these are the cases that have been presented to it has certified these class actions in situations involving local public officials or intellectual property cases brought by a single intellectual property rights holder. I think I may have seen them in a securities class action where there is a declining fund. Perhaps you are going to tell me I shouldn't worry about where if presented with this situation they would uphold the certification here, too.

MR. DeFILIPPO: Well, we're hopeful of that, your Honor. We have authority in our favor. They have never said no to it.

THE COURT: But given the due process and other concerns I mentioned earlier, why are you so I confident that they would allow it here?

MR. DeFILIPPO: Your Honor, this case is a para dynamitic example of why the rule should be applied to collective litigation. As you've heard there are 140 people all of whom say that they are different. We say they are all the same for purposes of the fundamental legal issues in the case. We need a class vehicle to decide that issue. We need a way to manage a litigation with that many parties. It is going to be a nightmare to manage otherwise. We think that Rule 23 was designed to allow management of defendants as well as plaintiffs. That's what it boils down to.

THE COURT: Is your stronger argument under (b)(1) or (b)(2) and could you explain to me why?

MR. DeFILIPPO: Your Honor, I didn't come prepared to make that argument today. I apologize to you.

THE COURT: But you are sure that on the issue of liability it is not (b)(3).

MR. DeFILIPPO: I am sure about that. Even though many of them are already in the case and so opting out even if they were certified under (b)(3) opting out doesn't do them any good as your Honor observed. They will still be parties. It will be nice to have a class that also bound people that we may be able to locate later.

THE COURT: I guess the concern that I have for your hybrid argument is that I think you and your adversaries have a different view and it is a bit of a chicken and egg issue between your request for declaratory relief and request for monetary relief. What I understand you to be claiming is that any request for monetary relief flows from the declaratory relief sought, namely, you would like the Court to find that certain things were amounted to improper ipso facto transactions and also declaratory judgment that the safe harbor does not apply to certain agreements and thereafter you hope to claw back moneys that were paid out by the trustees. I guess so but I guess it could be said equally as easily that what you want ultimately is not merely the declaratory relief but you want the money back. That is your obligation. You are trying to get as much back for the estate as possible. I am trying to figure out and your adversaries I know will argue the converse of what you now say to me, but I am trying to figure out what came first, the request for monitary relief or the declaratory relief and what I should consider to be driving this particular adversary proceeding.

MR. DeFILIPPO: Well, without a finding on liability we cannot get monetary relief of course, your Honor. So we need to get that first. We need to find liability. Secondly, the defendants have argued that they have defenses to the imposition of damages, a number of defenses including how you value the swaps. They challenge our determination that we were 3 billion in the money at the petition date. They say there are different ways to value the swaps and we weren't in the money. They also claim that they are not obligated to pay it back under a number of different theories that are defenses to the avoidance claims. So there are a lot of ways that we can get a finding on liability and may not able to get the damages.

THE COURT: Aren't the issues that you have just raised for me issues of individual import to particular defendants that counsel against certification of the class?

MR. DeFILIPPO: Not if they only relate to damages and damages are under (b)(3). Liability is not under (b)(3). It's hopefully under (b)(1) or (b)(2). So there are very few distinctions among the defendants with respect to liability. You haven't heard any really.

THE COURT: Okay. My question, and maybe I misperceived your prior answer to me, when you were talking about the fact that certain defendants believe that the transactions were not as favorable to LBSF as you suggested, I thought that would have suggested that there was no impermissible -- that the flip clause didn't matter because they were going to get money anyway.

MR. DeFILIPPO: No, your Honor. They go to our damages. They argue that depending on how you run one of these sophisticated computer models that calculates the value derivatives, you are not really owed 50 million, you are owed $2 or something like that. That's really what the defense is. It is not that there is no ipso facto clause because the swaps had no value. We wouldn't have sued people if me were sure the swaps had no value.

THE COURT: But did you consistently sue all of the counter-parties to the swapped transactions? Were there any as to whom you made a determination of the swaps value and not worth pursuing?

MR. DeFILIPPO: Yes, your Honor. And there are also a whole group of deals which are called the non-distributed deals where the trustees are still holding the money and where the noteholders did not receive it. Those are not before you, but theoretically I guess if there were adjudications in those cases, they could also be an intervening decision that might affect Judge Chapman's determination of this case.

THE COURT: They are their own adversary proceeding?

MR. DeFILIPPO: Yes.

THE COURT: They are before her now?

MR. DeFILIPPO: Yes.

THE COURT: They haven't been withdrawn or no one is passing on the issues in that case other than Judge Chapman?

MR. DeFILIPPO: Not that I know of, your Honor. I have those citations to Title 28, your Honor. 1331, 2244(d)(1)(B), 2255(a), 2264 (a), 4104(a)(1).

THE COURT: Thank you. There is an issue of typicality that is part of the Rule 23 analysis and I think I would like to just talk to you a little bit about what I was discussing with your adversaries. How deeply do I need to get into the weeds of the certification motion in order to figure out whether there are substantial federal non-bankruptcy issues that compel, not just counsel, withdrawal of the reference?

MR. DeFILIPPO: Your Honor, I don't think you need to get into it anymore deeply than the movants have asked you to get in their papers. That is limited to Rules Enabling Act and due process I think.

THE COURT: Okay.

MR. DeFILIPPO: We have only begun I think to cover those; but if you would like me to turn to those, I am happy to do so.

THE COURT: Yes. I am running out of specific questions for you, sir. I can make up some, but I would rather hear from you on as much as I know you enjoy standing here for this. Tell me why they are wrong.

MR. DeFILIPPO: They are wrong because they don't give full effect for the mandatory purposes, for the full text of 157(d)(2) second sentence. First of all, as you know there is a dispute over whether laws of the United States includes case law. I think the Alverton case put it best when they said judges of the United States in deciding cases and writing opinions aren't enacting laws regulating organizations or activities effecting interstate commerce. That is not their job. That is Congress's job. Laws of the United States regulating organizations or activities affecting interstate commerce also arguably doesn't apply to the Constitution if you follow extended stay in the other cases we cited to you that say the Constitution is not part of that for the statutory interpretive reasons which I mentioned earlier.

Secondly, many of the issues as I said don't involve substantial and material consideration. Finally, your Honor, there is nothing in their brief or in their reply that answers the interstate commerce question other than Judge Rakoff's decisions which as I've noted do not discuss the issue. Your Honor would be writing on a clean state as we view it. There are a couple of cases from out of this district that they cite. The Oil Company case which deals with the internal revenue code, which we concede is a law that regulates organizations or activities affecting interstate commerce. The Murry case deals with the Eleventh Amendment and the judge just says it is a law that regulates organizations or activities affecting interstate commerce without explaining why. There is very little persuasive or precedential value to any of the cases they cite on that issue and we don't think your Honor can ignore a key section of one 157(d)(2) in deciding this issue. REA, Rules Enabling Act, is not a law regulating organizations or activities affecting interstate commerce. It is part of Title 28. It derives from the judiciary power. It has nothing to do with Congress. Same could be said for the Rules Enabling Act. If you look at the he Co case, Co Truman, that dealt with the Tucker Act another Title 28 case and it made our argument for us. Title 28 is not a provision that derives from the commerce clause. It has no connection to the commerce clause. It is not rooted in the commerce clause. Those are the kinds of things that must be shown in order for a law of the United States to be the basis for mandatory withdraw.

THE COURT: Let's turn to permissive withdrawal.

MR. DeFILIPPO: Thank you.

THE COURT: There is something to be said for efficiencies. Although, I recognize that in saying that to take that to its logical extreme would require just getting rid of the standing order entirely and having everything come into the district court in the first instance, which is a unwise thing to do. It seems to me I feel for defendants who have been waiting five years to figure out whether B and Y is correct or not. Now, are there instances where they have squandered an opportunity to appeal it? I don't get that sense here. They just wanted to know and they haven't yet been in a position to figure it out and now, now, they have a chance to do so. Why shouldn't they? Why shouldn't they figure out whether this even works? Why shouldn't they be able to forestall a repeat of the Enron situation that we were talking about earlier and not have to go through the very significant burdensome exercises certifying a class first?

MR. DeFILIPPO: Well, a couple answers to that, Judge. First of all, they have four our $2 billion for that five years. It is not like they have been siting there waiting to get money from us.

THE COURT: Again, you are not foregoing interest; right?

MR. DeFILIPPO: No.

THE COURT: I didn't think so.

MR. DeFILIPPO: We still don't have either a judgment or the money back. It is a little premature to talk about interest. They have our money. If they want to put it up in escrow somewhere, we will forgo interest then.

THE COURT: I think it would have to be retrieved from various quadrants, but I understand.

MR. DeFILIPPO: That is why I made the offer; there is no chance.

THE COURT: You can put up another 2 billion to forestall interest. Please continue.

MR. DeFILIPPO: Secondly, your Honor, this issue is really an issue of first impression in the case before you.

THE COURT: Which issue is that, sir?

MR. DeFILIPPO: The issue of whether the ipso facto and other bankruptcy questions should be decided by Judge Chapman or by you. It goes back to who has final adjudicative authority over those questions. The bankruptcy judge clearly can decide what they characterize as the central issues in this case that you heard them say will determine the outcome of this case. She has the power post-Stern to make those decisions. The cases uniformly hold in the permissive context it is the analogue to the old core and non-core distinction, which was found to be determinative.

THE COURT: But this doesn't mean I don't have the power, right, it just means she does?

MR. DeFILIPPO: Yes. But if you are looking for what informs your Honor's discretion under the O'Ryan factors it is a very important fact whether the bankruptcy court can decide the key issues in the case as to whether or not you should or should not withdraw the reference. She has the power to decide the key issues in the case. The delay is not entirely our fault. Some of the delay has been caused by this motion. Well, we are prepared to move this case forward with alacrity.

THE COURT: I am confused as to how this motion is delaying this case because Judge Chapman hasn't stopped as a result of this motion.

MR. DeFILIPPO: Well, not really, your Honor. That's correct. But this motion has added to the burdens of the parties in litigating.

THE COURT: That I will stipulate. I have no reason to believe that she is waiting for me.

MR. DeFILIPPO: That's true.

THE COURT: Go on.

MR. DeFILIPPO: So why should you allow her to rule? Because she has the power to rule, because as you said earlier her views are of value to her, because the cases almost uniformly hold in the swaps context in the Lehman's case that the district court should obtain the benefits of the bankruptcy court's views on the issues either through decision or through a report and recommendation subject to de novo review, which is of an immense benefit to the district court in saving it time, saving the parties and the court time and focusing on the key things. Take advantage of the bankruptcy's court expertise in this area and the case will ultimately move quicker than it would otherwise move I think is the thrust of the 10 or so decisions that have denied withdrawal of the reference permissively in the Lehman case so far.

THE COURT: Your view here as well is if I stay out of the way, the case will move quickly?

MR. DeFILIPPO: Well, I am not familiar with your Honor's calendar and practices. So I am not going to say that is the case or not, but I think you would be justified in concluding that it would be the case if you allowed Judge Chapman to retain jurisdiction over the matter.

THE COURT: Now, your adversaries actually filed the papers so I am going to let them get the last word. I hear from you now if there is anything you want to make sure I am focused on.

MR. DeFILIPPO: There is one thing I would like to mentioned in mandatory and that is the whole idea that resolution of the issue has to be necessary to the resolution of the proceeding. That is the non-bankruptcy federal law issue has to be necessary to the resolution of the proceedings. None of these issues that they have raised is the basis for mandatory withdraw are necessary for the resolution of the proceedings. The the Second Circuit said exactly that. Not only most consideration of those issues be substantial and material they must be required for the resolution of the proceedings. So that is the language of the statute. None of these issues rise to the level of being dispositive.

THE COURT: Anything else?

MR. DeFILIPPO: No, your Honor.

THE COURT: Thank you.

Mr. Livshiz or Mr. Blocker, who would like to speak first? I have no questions for you. I just want to hear your responses, if any, that has been said to me.

MR. LIVSHIZ: Thank you, your Honor. Well, first of all I think we can start where Mr. Plaintiff's counsel left off which is necessary to the resolution of the proceeding. Given that albeit it is not as you just heard consistent with being with class action. I am not sure how it is possible to resolve the proceeding without resolving The American Pipe and 23(b)(2) issues that defendants have raised.

Then I would like to turn to the interstate commerce argument, your Honor. LB has spent a significant chunk of their brief and there are oppositions to our motion today talking about it, your Honor. This is a question in which we submit they are wrong for several reasons. First, if you -- at a very basic if you read the statute, the statute says there has to be a law that regulate activities affecting interstate commerce. The rules of the decision act, your Honor, is a law that in court state laws into the federal judiciary where that -- where federal courts adjudicate cases between litigants from different states asserting claims among others such as contracts and business torts. That absolutely affects interstate commerce, your Honor. Looking at the class action issues it occurs to me as I was listening to Mr. DeFilippo that there is very seldom where plaintiffs' lawyers and defense lawyers in this district agree; but if there is one thing which they can agree on whether is that class actions as they are practiced in the United States, in fact interstate commerce in the United States and affects business done in the United States. For that reason, your Honor, alone I submit that that resolves the interstate commerce question. However, the -- moreover, in the Southern District whether it is Judge Rakoff or to go all the way back to 1986 Judge Laval when he was in the District Court, was drawn questions on -- have withdrawn the reference on questions that were not -- did not require the interpretation of the statute passed under the commerce clause. Specifically, your Honor, I would like to point you to a case which is not cited in our papers. If possible, I would like to hand it up to you, your Honor. It is the John Maslo case. I gave a copy to plaintiffs' counsel today. In that case, your Honor, dating back top 1986 Judge Laval withdrew reference and the need to consider a contribution and indemnity claim as that claim concerned a federal statute. That was sufficient. Moving forward since then we have now had 30 years of interpretation and bankruptcy court -- sorry, district courts in this district have routinely withdrawn the reference on statutes that are not passed under the commerce clause.

In Re Oil, which concerns the internal revenue code as the Piccardo v. Flynn, your Honor, address the internal revenue code. To be honest I am not sure whether the internal revenue code is passed pursuant to the congressional spending power or pursuant to the Sixteenth Amendment, but what is quite clear is it not passed to the commerce power of the Constitution.

Your Honor, focusing on cases that out of the district court cases to which Mr. DeFilippo points, before we get to Cotermin I would like to refer your Honor to the Underwood case, which is one of the first cases from 1995 in the Northern District of Indian that considered this question. There the judge specifically admitted that he was taking a more restrictive view of this provision that other courts have taken. There, your Honor, and this is also a question in Cotermin, the question concerned whether -- the question concerned jurisdiction. In that case after finding the mandatory withdrawal was not implicated, the Judge nevertheless withdrew the reference anyhow. Cotermin then took that idea and applied it to the Tucker Act. The question in the Tucker

Act, your Honor, is whether sovereign immunity had been waived through the adjudication of certain claims. The reason -- one of the reasons the court refused to withdraw the reference in the Cotermin the case is to adjudicate the question required necessarily adjudicating a section of the Bankruptcy Code, Section 107, which waives sovereign immunity from bankruptcy proceedings. There is no similar provision of the Bankruptcy Code at issue here and all of the courts that have considered the question in the Southern District, save one the extended state case, have withdrawn the question and whether the federal law that requires interpretation is the statute federal common law for the United States Constitution.

Extended stay, your Honor, I submit can be limited to the question of whether just like In Re Chateaugay case, which we discussed earlier, are cases which consider the Bankruptcy Court's power to adjudicate certain issues. The issues we put before you today are not questions of whether a bankruptcy court can do something. There are a question of whether a federal court can do something, whether it certified a (b)(2) class, tolling a statute of limitation in the context of a defendant class, or adjudicate state law claims as against extraterritorial conduct.

Finally, there are issues of statutory interpretation, your Honor. As Judge Rakoff noted in Flynn -- sorry, in Access Management, a case cited in our papers, in considering the question of whether federal common law could be the basis of withdrawal, federal common law and certainly the Constitution are federal laws. To the extent that the statute was going to be written to require the interpretation of a statute passed by Congress laws, certainly the word "statute" could have been used not the word "law."

With that you, your Honor, turning to the question of hybrid certification and American Pipe, I will address the statute of the limitation question briefly at the end. Looking at LBSF's opposition to our motion here today and their reply under class certification context, some 20 cases are cited concerning hybrid certification. Those cases all have one thing in common: None of them are a defendant class. The due process issues raised by attempting to certify a (b)(2) class for liability, your Honor, are just as applicable and just as relevant to what an LBFS is trying to do in the context of a hybrid class as they would be in a stright up (b)(2) class.

In responding to a point that was made about seeking to impose counsel and an executive committee and defendants on efficiency point, your Honor, that was not done as a substitute for a class action. That was done as an addition to the class action vehicle.

THE COURT: You are suggesting that there was no alternative offer prior to the discussion of class certification?

MR. LIVSHIZ: Your Honor, as long as we have been involved in the case, we have not heard an alternative to class certification. This was always proceeding as a class. There is a reason for that, your Honor. Absent class there is no American Pipe toll. After the American Pipe tolling some 67 defendants accounting for $1.5 billion will we submit dismissed from this case.

Now, that brings us your Honor to the question of statute of limitation. Mr. DeFilippo is right that the avoidance claims do have the two-year statute. We submit, however, that he is wrong and that the other claims which LBSF seeks to invoke have a longer statute as that question is raised in this case, your Honor. So first of all, the state law fraudulent conveyance claims do in fact permit a six-year look-back but they have to be asserted within two years of the bankruptcy. That is Section 544. Beyond that, your Honor, defendants submit that the other claims, and this is the Barclay and Rosen cases cited in the supplemental brief on statute of limitations, require the application of a two-year statute to the other bankruptcy claims asserted by the estate. The estate says in response, No, what is necessary is to apply a statute of limitations that most naturally fits these provisions and the context of this case. That is clearly state law and that is clearly six years, but there is actually no warrant for that. In essence, what LBFS seeks to do here is make the defendants money its own. It seeks to clawback from defendants some $2 billion that they received in connection with these transactions plus another billion dollars in interest with that number increasing as we discussed the claim. There is no warrant at all for why the six-year statute should govern and we submit, your Honor, that in fact the two-year statute would be more appropriate.

Finally on the trustee point and the 550(f) point, that hasn't actually we submit help. In practical terms it has always had their money there so the claims had to be asserted within the two years.

Finally, to close off on extra territoriality, your Honor, at the heart of Mr. DeFilippo's argument is the sentiment that it is one sentence and therefore it will not require significant interpretation of federal law. Another federal statute comes to mind. Also raises quite a ruckus in the extraterritoriality context and that is the alien tort statute. That one-sentence statute has been up to the Supreme Court twice in recent memory, your Honor, including in the DeQuebo case which is where the Supreme Court interpreted the alien tort statute, the one-sentence statute, they concluded that it is barred extraterritorial application of the law. Similarly here, we submit, your Honor, the interpretation of the Rules of Decision Act will be required.

THE COURT: Anything else, sir?

MR. LIVSHIZ: No.

THE COURT: Your last chance.

MR. LIVSHIZ: Not from me.

THE COURT: Mr. Blocker?

MR. BLOCKER: Judge, I have two small points that will take a couple minutes. Lehman's counsel argued you asked him some questions or several questions about the safe harbor, but I think what you heard in his answers tells you that there is nothing left for Judge Chapman to do. What I wrote down that Mr. DeFilippo says was that all Judge Chapman will have to do with respect to the safe harbor is take a look at the various documents that are out there and decide if the priority provisions are part of the swap or not. If that is literally all she has to do, why do we have to wait years on end for that to happen? We can take that issue up to your Honor and we can deal with it. What he is basically conceding is getting all the guidance you can get from the bankruptcy court on that.

THE COURT: I didn't get that sense. We may have heard him differently. I thought what he was saying was there are ideas that are present in B and Y and Valley Rock and Michigan and they require still to examine the agreements. You are obviously, sir, not going to roll over when it comes to B and Y and its applicability or its controlling of the decisions. I think what he is saying is not that the decision is made already but that a thoughtful decision actually requires Judge Chapman to look at the underlying documents. We can disagree on that.

MR. BLOCKER: I just heard it differently, your Honor. There is not a whole lot for Judge Chapman to do, which she is going to do is apply Judge Peck's methodology. I am not sure what Judge Peck did because there are only three sentences in the whole opinion of analysis of the safe harbor. I don't know what Judge Peck was looking at when he did it. It doesn't sound like there is a whole lot of bankruptcy court expertise that is needed to do it.

The other point I wanted to make, your Honor, is you asked Lehman's counsel a question at end about why is it fair? Have we blown chances to appeal? Are we not taking advantage of opportunities? Why is it fair to delay further? I didn't really hear an answer. The short answer is we of course haven't had any opportunity to appeal because none of these defendants was in any of the prior adversary proceedings we're talking about. The cases have been stayed for last four years and we're prohibited from doing anything other than dealing with class certification for the movement. In terms of the why is it fair, this case has been going on five years without any review of that decision. Your Honor points to Enron. That is a perfect example of what can happen. You go through a bunch of proceedings. At the end somebody decides, the Second Circuit decides that the safe harbor applies therefore we're out as a matter of law. Why have that delay? I don't think Lehman's brief points to a single reference to withdraw case where the defendants had to wait five years for an opportunity to test a legal principle that was decided in some other case. I am not aware of any case like that. As I said before I really think that is what makes this unusual but unique candidate for withdrawal.

THE COURT: Thank you very much for the argument today.

Was it helpful? Absolutely. Did it clarify issues? Some. Are there still issues? Yeah, of course. I will let you go and have your respective postmortems on that. I will get the transcript in the next 36 hours and we'll go from there.

Let's go off the record for a moment, please.

(Discussion held off the record)

You have given me a lot to think about.

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